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In The

Supreme Court of the United States

October Term, 1993

WILLIAM H. FLEMING,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

KEITH A. WARD
Counsel of Record

TILLY & WARD
Two West Second Street
P.O. Box 3645
Tulsa, OK 74101-3645
(918) 583-8868
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether a firearms transferor may be found guilty of making a false statement on a firearm transfer form as to the taxability of the transfer if the transferor has knowledge that the approved tax-exempt transferee may later make another tax-exempt transfer of the same firearm to a third-person who could not have received the firearm from the transferor on a tax-exempt basis in the first instance?

2. Whether the "willfulness" *mens rea* requirement for income tax violations which is set forth in *Cheek v. United States*, 498 U.S. 192 (1991), is also a required element of proof in a criminal prosecution for making false statements on a transfer tax form under the National Firearms Act?

3. Whether, under the circumstances of this case, the term "transfer" and its derivatives as used in the National Firearms Act, 26 U.S.C. § 5645(j), is ambiguous thus requiring application of the rule of lenity in the manner required by *United States v. Thompson/Center Arms*, 112 S.Ct. 2101 (1992)?

PARTIES

The Petitioner is William Hugh Fleming. The respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. Procedural History 1

B. Historical Background 3

REASONS FOR GRANTING THE WRIT 7

I. THE COURT OF APPEALS' DECISION WILL PERMIT THE ARBITRARY PROSECUTION OF ANY TRANSFEROR OF ANY REGULATED FIREARM 8

A. The definition of the term "transfer" and its derivatives 10

B. The statutory requirement to "register" a firearm transfer 13

C. The government's theory of prosecution in this case 14

D. The potential for arbitrary interpretation and enforcement of criminal sanctions 16

II. THE COURT OF APPEALS' DECISION APPEARS TO CONFLICT IN PRINCIPLE WITH RECENT DECISIONS OF THIS COURT 20

TABLE OF CONTENTS – Continued

Page

A. The Apparent Conflict in Principle Between the Decision of the Court of Appeals and *Cheek v. United States* 20

B. The Apparent Conflict in Principle Between the Decision of the Court of Appeals and *United States v. Thompson/Center Arms Co.* 25

CONCLUSION 30

APPENDICES

APPENDIX A 1a

APPENDIX B 16a

APPENDIX C 22a

APPENDIX D 40a

APPENDIX E 51a

APPENDIX F 57a

TABLE OF AUTHORITIES

Page

CASES

Bifulco v. United States, 447 U.S. 381 (1980) 26

Cheek v. United States, 498 U.S. 192 (1991) ..... *passim*

Commissioner v. Newman, 159 F.2d 848 (2d Cir.), *cert. denied*, 331 U.S. 859 (1947) 20

Crandon v. United States, 494 U.S. 152 (1990) 25, 28, 29

Haynes v. United States, 390 U.S. 85 (1968) 13

Staples v. United States, 62 U.S.L.W. 4379 (U.S. May 24, 1994) 18, 23, 24

United States v. Bass, 404 U.S. 336 (1971) 24

United States v. Bogden, 865 F.2d 124 (7th Cir. 1988), *cert. denied*, 490 U.S. 1010 (1989) 14

United States v. Dalton, 960 F.2d 121 (10th Cir. 1992), *cert. denied*, 114 S.Ct. 253 (1993) 2, 8

United States v. Freed, 401 U.S. 601 (1971) 23

United States v. Garrett, 984 F.2d 1402 (5th Cir. 1993) 24

United States v. Hernandez-Urista, 9 F.3d 82 (10th Cir. 1993) 22

United States v. Huddleston, 415 U.S. 814 (1974) 12

United States v. Keifer, 694 F.2d 1109 (8th Cir. 1982) ..9, 10

United States v. Morris, 20 F.3d 1111 (11th Cir. 1994) 21

United States v. Palmer, 435 F.2d 653 (1st Cir. 1970) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Ponder, 522 F.2d 941 (4th Cir.), *cert. denied*, 423 U.S. 949 (1975) 13

United States v. Rock Island Armory, Inc., 773 F. Supp. 117 (C.D. Ill. 1991) 2, 8

United States v. Stella, 448 F.2d 522 (9th Cir. 1971) 13

United States v. Thompson/Center Arms Co., 112 S.Ct. 2102 (1992) ..... *passim*

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 24

United States v. Williams, 872 F.2d 773 (6th Cir. 1989) 24

Von Eichelberger v. United States, 252 F.2d 184 (9th Cir. 1958) 11

Zwak v. United States, 848 F.2d 1179 (11th Cir. 1988) 13

STATUTES AND RULES

18 U.S.C. § 209 29

18 U.S.C. § 922(o) 2

18 U.S.C. § 924(a) 2

26 U.S.C. § 5801 ..... 2, 3

26 U.S.C. § 5811 ..... 1, 4, 9

26 U.S.C. § 5812 ..... 1, 9, 11, 13, 17

26 U.S.C. § 5821 27

26 U.S.C. § 5822 27

26 U.S.C. § 5841 ..... 9, 13, 14, 27

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. § 5845(j) 1, 9, 10, 26, 27

26 U.S.C. § 5852 ..... 1, 4, 5

26 U.S.C. § 5853(a) 4, 9

26 U.S.C. § 5861 ..... *passim*

26 U.S.C. § 5871 ..... 2, 23, 24, 28

26 U.S.C. § 7201 21

26 U.S.C. § 7203 21

26 U.S.C. § 7206 21

27 C.F.R. § 179.81 1

27 C.F.R. § 179.82 1

27 C.F.R. § 179.90 ..... 1, 4, 9

MISCELLANEOUS

SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY OF THE SENATE COMM. ON THE JUDICIARY, S.Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 11

Hearings on Anti-Crime Program Before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess., 260 (1967), *reported in United States v. Huddleston*, 415 U.S. 814, 827 n.8 (1974) 12

UNITED STATES SENTENCING GUIDELINES §§ 2T1.1, 2T4.1 24

PETITION FOR A WRIT OF CERTIORARI

William H. Fleming petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the judgment imposed against him.

OPINIONS BELOW

The court of appeals' decision is reported at 19 F.3d 1325. (App., *infra*, 1a-15a). The Judgment of the district court is reproduced in the Appendix (App., *infra*, 16a-21a).

JURISDICTION

The Court of Appeals for the Tenth Circuit published its opinion on March 23, 1994, affirming his criminal conviction and the judgment of the district court. (App., *infra*, 1a). The jurisdiction of this Court is invoked under 18 U.S.C. § 1254(1) (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

26 U.S.C. § 5811 (1988), App., *infra*, 57a.

26 U.S.C. § 5812 (1988), App., *infra*, 57a.

26 U.S.C. § 5845(j) (1988), App., *infra*, 58a.

26 U.S.C. § 5852 (1988), App., *infra*, 58a-59a.

26 U.S.C. § 5861(*l*) (1988), App., *infra*, 59a-60a.

27 C.F.R. § 179.81 (1988), App., *infra*, 60a.

27 C.F.R. § 179.82 (1988), App., *infra*, 60a.

27 C.F.R. § 179.90 (1988), App., *infra*, 60a-62a.

STATEMENT OF THE CASE

A. Procedural History

Mr. Fleming is a licensed manufacturer, importer and dealer of all firearms referred to in his indictment. He was indicted by the United States Grand Jury for the Northern

District of Oklahoma on December 5, 1991. On March 6, 1992, the same grand jury returned an eight-count superseding indictment ("the Indictment") as to which Mr. Fleming exercised his right to jury trial. (App., *infra*, 22a-39a).

The Indictment charged Mr. Fleming with conspiracy to violate and with substantive violations of the National Firearms Act, 26 U.S.C. §§ 5801-5872 (1988) (the "NFA"). Count 1 of the Indictment charged Mr. Fleming with conspiring to "obtain, transfer, receive and possess firearms . . . without proper registration and without paying applicable transfer taxes and fees." (App., *infra*, 22a-27a). Counts 2 and 3 similarly charged Mr. Fleming with conspiring to transfer firearms "without paying the applicable transfer taxes." (App., *infra*, 27a-36a).

Counts 4, 6 and 8 of the Indictment charged Mr. Fleming with making false statements in firearms transfer forms in violation of 26 U.S.C. §§ 5861(*l*) and 5871. (App., *infra*, 36a, 37a, 38a-39a). As to each of those counts, the Indictment alleged that Mr. Fleming (1) falsely stated that the respective firearms transfers were not subject to the payment of federally required transfer taxes and (2) falsely identified the transferees of the firearms.

Count 5 of the Indictment charged that Mr. Fleming possessed firearms that were not registered to him in violation of 26 U.S.C. § 5861(d). (App., *infra*, 36a-37a). Count 5 was dismissed three days before the start of the trial when the government realized that there was no factual basis for the allegation contained in count 5.

Count 7 of the Indictment charged Mr. Fleming with possessing firearms in violation of 18 U.S.C. §§ 922(o) and 924(a). (App., *infra*, 38a). On the authority of *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117 (C.D. Ill. 1991), Mr. Fleming challenged by pretrial motion the government's authority to charge him in count 7 of the Indictment with regulatory violations of the NFA with respect to firearms allegedly manufactured after May 16, 1986. Although the motion was initially overruled, the court dismissed count 7 on the government's motion shortly after the Tenth Circuit Court of Appeals published its opinion in *United States v. Dalton*,

960 F.2d 121 (10th Cir. 1992), *cert. denied*, 114 S.Ct. 253 (1993), adopting the position asserted by Mr. Fleming.

Counts 1, 2, 3, 4, 6 and 8 of the Indictment were tried to a jury. The jury was unable to reach a verdict on counts 1, 4 and 6 and a mistrial was declared as to those counts. The jury did, however, convict Mr. Fleming of counts 2, 3 and 8 of the Indictment. Judgment was imposed by the court on August 13, 1992. (App., *infra*, 16a-22a).

On August 8, 1992, Mr. Fleming filed a Notice of Appeal. After briefing, oral argument was presented to the court of appeals on September 1, 1993. On March 23, 1994, the court of appeals published its opinion affirming the judgment. (App., *infra*, 1a-16a).

B. Historical Background

Mr. Fleming is a special occupational taxpayer, *see* 26 U.S.C. § 5801, and a federally licensed manufacturer and dealer of each of the firearms referred to in his Indictment. At no time has it ever been alleged that he or any transferee of the subject firearms was under a legal disability to possess the subject firearms or that any of the firearms were used or intended to be used for any illegal purpose. Notwithstanding Mr. Fleming's conviction on two counts of conspiracy to violate the NFA, all of his alleged co-conspirators, including various law enforcement officials, testified that they had no agreement with Mr. Fleming to violate the law, that they believed their actions were in compliance with the law, that they never intended to violate the law, and that they believed their actions had actually complied with the law.

In the ordinary course of his firearms business, Mr. Fleming became acquainted with a reserve police officer from the city of Drumright, Oklahoma named Stephen Scribner. Mr. Scribner was a collector of firearms and had previously been a licensed dealer. Mr. Scribner also expressed an interest in brokering various firearms transactions for profit. One of the means by which Mr. Scribner intended to broker the transactions, however, was to obtain firearms from police agencies after they had first been transferred to the police

agencies thus permitting him to acquire or broker the firearms without the payment of a transfer tax. Because of his relationships with law enforcement officials, Mr. Scribner was able to enlist their cooperation in making application for various firearms to be transferred to and from the police agencies.

It is unquestioned that if any non-special occupational taxpayer transfers a firearm to another non-special occupational taxpayer, a transfer tax in the amount of $200 is payable to the Treasury. *See* 26 U.S.C. §§ 5811, 5852(d). However, because firearms can also be transferred **to** or **from** police agencies without payment of a transfer tax, 26 U.S.C. § 5853(a), 27 C.F.R. § 179.90, the net result of first transferring a firearm to a police agency and later transferring the firearm to a third-party is that the third-party may receive the firearm without payment of a transfer tax. The government referred to such indirect transfers as "papering" the firearms through police departments.

Mr. Fleming's Indictment alleged three separate schemes to "paper" firearms through police agencies. The first alleged that Mr. Fleming and others conspired to personally acquire a number of M-203 grenade, flare and tear-gas launchers from Colt Manufacturing ("Colt") by "papering" them through the Seminole (Oklahoma) Police Department ("the SPD"). In doing so, the Indictment alleged that Mr. Fleming caused Colt to make false statements in its BATF Forms 5 (Application for Tax-Exempt Transfer and Registration of a Firearm), (App., *infra*, 40a-50a), by stating that "the transfer of certain grenade launchers was not subject to federally required transfer taxes." The actual statements made on the respective BATF Forms 5 are precisely stated as follows:

> **I believe that I am entitled to exemption** from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason (See Instruction 6):
>
> [ ] Firearm is unserviceable and is being transferred as a curio or ornament (6a)

[X] **Firearm is being transferred to or from a governmental entity (6b & 6c)**

[ ] Firearm is being transferred to a lawful heir (6d)

[ ] Other (specify)

(App., *infra*, 49a) (emphasis added).

As to this transaction, the undisputed evidence demonstrated that the firearms were physically transferred from Colt to the SPD for a period of approximately 45 days during which time the Chief of the SPD applied for a tax-exempt transfer of the firearms to Mr. Fleming. After approval by BATF, the firearms were physically transferred to Mr. Fleming.

The government's theory on these allegations has always been ill-conceived inasmuch as both Mr. Fleming and Colt are both special occupational taxpayers licensed to make and transfer such firearms and, for that reason, direct transfers of such firearms from Colt to Mr. Fleming are exempt from the payment of a transfer tax. 26 U.S.C. § 5852(d). Despite the legal impossibility of committing such a crime, those counts were submitted to the jury which deadlocked on them. Because the government has never dismissed those counts and the statute of limitations has not run on them, Mr. Fleming remains in jeopardy of re-indictment and/or trial on them.

The second transaction referred to in the Indictment alleged that Mr. Fleming conspired with Mr. Scribner and others to "paper" six automatic firearms through the SPD. As to that transaction, the undisputed evidence reflected that a Texas firearms collector, George Gibbons, wished to sell six firearms. Mr. Gibbons applied for and received a tax-exempt transfer allowing him to transfer the firearms to the SPD. The firearms were then physically transferred to the SPD for a period of approximately 70 days during which time, the SPD, acting through its Chief, applied for and received a tax-exempt transfer of the firearms to other third-parties. The Indictment further alleged that Mr. Fleming caused Mr. Gibbons to make a false statement in his BATF Form 5 by causing Mr. Gibbons to state "that the transfers of the six

machineguns was [sic] not subject to federally required transfer taxes." The jury convicted Mr. Fleming of conspiring to make a false statement on the BATF Form 5 concerning whether the transfer was subject to the payment of transfer taxes but deadlocked on the substantive count alleging an actual false statement on the BATF Form 5. Because the government has not dismissed that count and the statute of limitations has not run on it, Mr. Fleming remains in jeopardy of re-indictment and/or trial on that count.

The final transaction alleged that Mr. Fleming, Mr. Scribner and others conspired to make and did make false statements relating to the transfer of two firearms to the Creek County, Oklahoma District Attorney's Office. The Indictment alleged that Mr. Fleming falsely stated in BATF Forms 5 that "the transfers of said machineguns and silencers were not subject to federally required transfer taxes." The government's theory was simply that Mr. Fleming evaded the transfer taxes by "papering" the firearms through the District Attorney's Office when the intended transferees of the firearms were Mr. Scribner and a friend of Mr. Scribner's, attorney Clayton Badger.

The undisputed evidence as to this transaction, unlike all the other transactions referred to in the Indictment, reflected that Mr. Fleming owned the firearms for which the transfer application was submitted. Because Mr. Fleming believed that Mr. Scribner was brokering the sale of the firearms to the District Attorney's Office, Mr. Fleming never had any personal contact with any member of the District Attorney's Office. After the BATF approved the transfer, Mr. Fleming provided the firearms to Mr. Scribner for delivery to the District Attorney's Office which was only a few miles from Mr. Fleming's business. According to Mr. Scribner's testimony, however, he always intended that he, not the District Attorney's Office, would be the ultimate transferee and the firearms would never be physically transferred to the District Attorney's Office. Nonetheless, Mr. Scribner then caused Assistant District Attorney Don I. Nelson to sign additional applications for tax-exempt transfers of the firearms to Mr. Scribner and Mr. Badger. The BATF never approved these

transfers, and the firearms were later seized from the possession of Mr. Scribner and Mr. Badger. Mr. Fleming was convicted of conspiring to make and of making false statements on his BATF Forms 5 as to the taxability of the transfer and the identity of the transferee. (counts 3 & 8).

As to all of the counts in the Indictment, the government's theory was admitted by it to be *sui generis*. Its theory was simply that the initial BATF Forms 5 should have identified the third-parties as the transferees despite the fact that the firearms were physically transferred to the police agencies. Because the initial transfer forms failed to identify the third-parties as the transferees, the government contends that the applications contained two false statements, i.e., that the transfers were not subject to the payment of transfer taxes, and that the transferees were police agencies.

As will be demonstrated, the government's theory of prosecution in this case and the decision of the court of appeals affirming Mr. Fleming's conviction will permit arbitrary prosecution of firearms transferors, will criminalize the innocent acts of law-abiding, well-intentioned firearms transferors and will permit the unregistered possession of firearms. Although the facts of this case involve only transfers from individuals to police agencies, the principles approved by the court of appeals potentially affects every regulated firearms transfer in this country regardless of whether such transfers involve police agencies.

REASONS FOR GRANTING THE WRIT

By its decision affirming Mr. Fleming's conviction, the court of appeals incorrectly decided important issues arising under the NFA relating to the responsibilities of every person who makes a firearms transfer to or from a law enforcement agency. Unless reviewed by this court, that decision will allow the government to arbitrarily prosecute any firearms transferor based on facts over which the transferor has no control. The issues decided by the court of appeals have never been previously decided by any of the courts of appeal or by

this Court. Because of the effect the court of appeals' decision will have on the transfer of firearms, the decision of the court of appeals should be reviewed and settled by this Court. While not in direct conflict with decisions of this Court, the court of appeals' decision conflicts generally with the principles recently stated by this Court in *United States v. Thompson/Center Arms Co.*, 112 S.Ct. 2102 (1992) and *Cheek v. United States*, 498 U.S. 192 (1991).

I. THE COURT OF APPEALS' DECISION WILL PERMIT THE ARBITRARY PROSECUTION OF ANY TRANSFEROR OF ANY REGULATED FIREARM

Each year, thousands of firearms are transferred to police agencies. If permitted to stand, the court of appeals' decision will leave each transferor vulnerable to criminal prosecution. Furthermore, the most significant factor relative to the potential criminal liability of the transferor – whether the firearm will later be transferred to a third-party – is and will be beyond the control of the transferor. Even more significantly, if the government's theory of this case is correct, there will be instances regularly confronting firearms transferors in which it will be impossible to achieve compliance with the law and which will leave well-intentioned firearms transferors with no course of action other than to violate the law. While these statements may appear far-fetched, they are not. To understand how the court of appeals' decision could cause such an improper result, however, some background as to the NFA and its application to this case is necessary.

The constitutional underpinnings of the NFA lie in the taxing power of Congress. *See United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), *cert. denied*, 114 S.Ct. 253 (1993); *United States v. Rock Island Armory, Inc.*, 773 F. Supp. 117, 118 (C.D. Ill. 1991). As part of the NFA, the government possesses the power to tax transfers of firearms. As an agency of the government, the Bureau of Alcohol, Tobacco and Firearms ("the BATF") regulates, oversees and documents all regulated firearms transfers. This incidental regulatory power

includes the power to prohibit and track the transfer of firearms to persons under disabilities from firearms ownership such as convicted felons.

It is undisputed that the NFA permits the government to accomplish two legitimate goals – the collection of taxes and the prohibition of transfers to persons under legal disabilities from firearms ownership. Because all transfers in this case were to police agencies, this case involves only the former, the power to assess and collect taxes and the corresponding duty of a transferor to accurately state on the taxing form the factors affecting the taxability of the transaction.

As part of the NFA, Congress has imposed a $200 "transfer tax" on the "transfer" of every firearm. 26 U.S.C. § 5811. The term "transfer" is defined in 26 U.S.C. § 5845(j) as follows:

> **(j) Transfer.** – The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, **loaning**, giving away, **or otherwise disposing of.** (emphasis added).

The definition of the term "transfer" includes every instance in which the transferor surrenders control or dominion over the firearm. *United States v. Keifer*, 694 F.2d 1109, 1114 (8th Cir. 1982). "The plain implication is that the transferor is the one controlling the ultimate disposition of the weapon." *Id.* Before possession of a firearm may be delivered to a "transferee," the "transferor" must (1) transmit to the BATF an application containing information about the proposed transfer; (2) pay any tax assessed; and (3) obtain approval of the transfer from the BATF. 26 U.S.C. § 5812(b). Upon the approval of a transfer, the BATF enters the information about the transfer in the National Firearms Registration and Transfer Record ("the Firearms Registry") and returns the approved transfer form to the transferor. *See* 26 U.S.C. § 5841. The transferor then delivers possession of the firearm and a copy of the BATF form approving the transfer to the transferee.

As part of the NFA, Congress has exempted transfers of firearms to and from law enforcement agencies from the payment of the transfer tax. 26 U.S.C. § 5853(a); 27 C.F.R.

§ 179.90. Because of the "police agency" exemption, any "selling, assigning, pledging, leasing, **loaning**, giving away, **or otherwise disposing of**" any firearm to a law enforcement agency is exempt from payment of the $200 transfer tax. Consequently, it is axiomatic that Mr. Fleming cannot be convicted of making a false statement in a transfer form in which a police agency is identified as the transferee if the subject firearm was either "loaned" or "otherwise disposed of" to the police agency.

In spite of the foregoing, Mr. Fleming stands convicted of such a violation, and the court of appeals' decision affirming Mr. Fleming's conviction will permit BATF to indict and convict virtually any firearms owner who transfers a firearm to a law enforcement agency. Because thousands of firearms are transferred to and from law enforcement agencies annually, the potential for arbitrary prosecution and the threat to firearms dealers to be subjected to such abuse is substantial. To understand the threat of arbitrary criminal prosecution that Mr. Fleming's conviction would permit, some digression is needed at this point to explain the legal and factual circumstances giving rise to Mr. Fleming's conviction.

A. The definition of the term "transfer" and its derivatives. Under the NFA, the transfer of a firearm is lawful if a transfer application containing all required information is filed with the BATF and any assessed tax is paid. *Keifer*, 694 F.2d at 1114. In this case, the transfer forms containing all required information were sent to and approved by BATF. For purposes of illustration, samples of the BATF Forms 5 from each of the subject transactions are contained in the Appendix. (App., *infra*, 51a-56a). In the transfer forms, the transferees were identified either as the Seminole Police Department or the Creek County District Attorney's Office. To determine whether those statements were false, however, it is necessary to understand not only the definition of the term "transfer" but also the underlying reasons for registration of firearms.

In interpreting the term "transfer" in § 5845(j), the Ninth Circuit stated as follows:

> This definition encompasses a rather broad field and denotes a purpose on the part of Congress **to cover all transactions in which the possession of firearms . . . passes.**
>
> * * *
>
> It is apparent that Congress in enacting Chapter 53 of the Internal Revenue Code intended to prohibit the physical transfer of firearms except within its terms. This is evidenced by the fact that it added to the definition the all-embracing provision "or otherwise dispose of. . . . "
>
> It is apparent that Congress intended to regulate **the physical transfer** of firearms notwithstanding legal title may not have passed. **This is evidenced by the fact that it included therein the terms assignments, pledges, leases and loans of firearms, which are without question instances of the parting of possession but retention of title.**
>
> Congress had a firm purpose in passing the statute to enable the Federal Government to supervise the **acquisition** of firearms so that those who would subvert their use to an evil purpose could be circumvented.

Von Eichelberger v. United States, 252 F.2d 184, 185 (9th Cir. 1958) (emphasis added).

The Ninth Circuit's statement that a transfer is required for a mere change of possession is borne out by the express language in 26 U.S.C. § 5812(b), which states that "[t]he transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section."

The legislative history of the NFA and other firearms legislation also supports a broad interpretation of the definition of the term "transfer." The language of the Senate Subcommittee hearings on the Federal Firearms Act indicates that a "sale or disposition" includes "all types of sales or dispositions." SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY OF THE SENATE COMM. ON THE JUDICIARY, S.Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112.

Moreover, Congress has given weight to the Justice Department's broad interpretation of the term "transfer."

Testimony by then-Attorney General Ramsey Clark also supports the rejection of the government's suggestions that the language of the statute be given a restrictive meaning:

> Mr. Donohue. Do you not think, Mr. Attorney General, to attain the real objective and purpose of this bill, it should not only deal with the sale, but whoever sells or delivers?
>
> Mr. Clark. It covers delivery, too.
>
> Mr. Donohue. Where?
>
> Mr. Clark. Well, generally through the bill when you talk about – well, it would be unlawful for any licensed importer to sell or deliver. Any licensed dealer to sell or deliver.
>
> Mr. Donohue. It is not restricted to just sale for consideration?
>
> Mr. Clark. No. The delivery, too.

Hearings on Anti-Crime Program Before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess., 260 (1967), *reported in United States v. Huddleston*, 415 U.S. 814, 827 n.8 (1974).

Relying on the above-quoted testimony of Attorney General Clark and the broad interpretation of the term urged by the government, this Court stated that "[a]s defined by the Act, 'transfer' meant to 'to sell, assign, pledge, lease, loan, give away, or otherwise dispose of.' The term 'otherwise dispose of' in that context was aimed at providing maximum coverage." *Huddleston*, 415 U.S. at 826-27.

In light of the foregoing authorities and the history of the NFA, it is Mr. Fleming's position that a "transfer" occurs on a regulated firearm any time the firearm changes actual, physical possession. When one analyzes the transactions from which Mr. Fleming's convictions arise, it is clear that "transfers" occurred as a matter of law. In every instance, the transferors made application and received approval from BATF to transfer the firearms to the transferees at which time

physical possession of the firearms was delivered to the transferee. For that reason, none of the statements on the Forms 5 that identified the transferees as police entities were false.

B. The statutory requirement to "register" a firearm transfer. Although Mr. Fleming was not charged with failing to register possession of a firearm, a discussion of the registration requirements under the NFA is helpful. "Registration" and "transfer" are merely two sides of the same coin since all "transfers" of firearms must be "registered." 26 U.S.C. § 5812(a). Therefore, if an obligation existed under the NFA to register the subject firearms transactions, the law regards the transactions as "transfers." Moreover, if Mr. Fleming's acts were committed to comply with the law, the BATF may not impose penal penalties for acts that were committed for the purpose of complying with the NFA. *Zwak v. United States*, 848 F.2d 1179, 1183 (11th Cir. 1988).

Every possessor of a firearm is obligated to register his possession with the BATF. In the words of this Court, "[T]he obligation to register is conditioned simply upon possession of a firearm. . . . " *Haynes v. United States*, 390 U.S. 85, 96 (1968). Conviction under the registration requirements of the NFA requires only that the government prove that the defendant possessed a firearm not registered to him in accordance with 26 U.S.C. § 5841. *United States v. Ponder*, 522 F.2d 941 (4th Cir.), *cert. denied*, 423 U.S. 949 (1975). Section 5841 provides that the Secretary of the Treasury maintain a central registry of firearms that identifies the person "entitled to possession of the firearm."

On the other hand, 26 U.S.C. § 5861(d) makes it unlawful for any person "to receive **or possess** a firearm which is not registered to him in the National Firearms Registration and Transfer Record." "In other words, persons not registered are not entitled to possession." *United States v. Palmer*, 435 F.2d 653, 656 (1st Cir. 1970); *see also United States v. Stella*, 448 F.2d 522, 524 (9th Cir. 1971).

From the foregoing analysis, it is axiomatic that one who "transfers" possession of a firearm to another must register such person's possession of the firearm with the BATF. No

person other than the one who is a registered transferee of a firearm may possess the firearm. In this case, however, Mr. Fleming has been convicted of criminal violations for having attempted to comply with these simple axioms.

C. The government's theory of prosecution in this case. The error in the government's theory of prosecution in this case and, hence, the court of appeals' decision, stems from an erroneous construction of the NFA. The government has continually asserted that the firearms transfers from which Mr. Fleming's convictions arise were shams because the law enforcement agencies identified on the transfer forms did not "own" the firearms. Therefore, it reasons, the statements identifying the governmental agencies as "transferees" of the firearms were false. Such reasoning is faulty, however, because it equates possession with ownership and fails to recognize that a "transfer" becomes effective upon a change of **possession,** not ownership.

In *United States v. Bogden*, 865 F.2d 124 (7th Cir. 1988), *cert. denied*, 490 U.S. 1010 (1989), the defendant challenged his conviction for possession of an unregistered firearm on the grounds that he did not own it. In affirming his conviction, the court stated:

> [The appellant's] argument fails because the statute criminalizes possession and/or transfer of illegal firearms; it does not make ownership interest in the firearm an element of either crime. As the government points out, Bogden wrongly assumes that possession is *equivalent* to ownership. Although the Act does not define possession, we have upheld a jury instruction explaining that a person has actual possession of an object if he "knowingly has direct physical control over a thing at a given time." Clearly, one can "knowingly have direct physical control" over an object without owning it.

Id. at 126 (citations omitted).

In this case, all of the firearms were registered to the entity "entitled to possession" as required by § 5841. Every Form 5 contained all required information and at no time was

physical possession of a firearm ever delivered until after BATF approved the transfers. As a result, Mr. Fleming stands convicted for attempting to assure compliance with the NFA.

The government's theory of prosecution in this case is relatively simple. Notwithstanding the testimony of its alleged co-conspirator witnesses to the contrary, it was the government's position that Mr. Fleming conspired with police officers and others to avoid the payment of transfer taxes on firearms transferred to private individuals by "papering" them through law enforcement agencies. In other words, since there is no transfer tax payable upon the transfer of a firearm either **to** or **from** a law enforcement agency, the government asserted that Mr. Fleming indirectly made tax-free transfers of firearms to individuals who could not directly receive them on a tax-exempt transfer by "papering" them through police agencies.

Because the government reasoned that Mr. Fleming knew or had reason to believe that the police agency would at some future time transfer the firearms to the third-party, his representation to BATF on his Form 5 identifying his transferee as the police agency and stating that he believed the transfers were exempt from the payment of a transfer tax were false. Under such circumstances, the government reasons, Mr. Fleming should have identified the third-party, not the police agency, as his transferee. Such reasoning, however, fails to account for the fact that by doing so, the police agency would have been a felonious unregistered possessor of the firearms during the period that it had actual physical possession of the firearms. Such reasoning also would permit the prosecution of any person who transferred any firearm to another person if such transferee later transferred the firearm to a third-party within an as yet undefined period which the government later unilaterally determined to be too brief a period to justify registration in the intermediate transferee.

D. The potential for arbitrary interpretation and enforcement of criminal sanctions.

Against the foregoing backdrop, the fallacy of the government's position is clear and is most easily understood by envisioning the circumstances in which a firearms transferor can be placed in a legal "catch 22" in which he cannot submit a BATF Form 5 without violating the law. To illustrate those circumstances, let us assume, as we must in this appellate forum, that the facts alleged by the government are true. In other words, let us assume that Mr. Fleming, the police agencies and the third-parties all intended and had actual knowledge that the police agency would accept possession of a firearm for an indefinite period of time to test-fire or simply examine the firearm with the intention of later transferring the firearm to the third-party.

If Mr. Fleming's conviction is not reversed, the law will effectively preclude any lawful transfer of the firearm under this scenario. For instance, if Mr. Fleming or any other transferor were to make an initial application to BATF to transfer the firearm to the police agency, as he did in this case, he would commit the crime of making false statements as to the identity of the transferee on the transfer application because of his actual knowledge that the firearm was to be later transferred to the third-party. Under the rule created by the decision of the court of appeals, the transferor is required to identify the ultimate transferor despite the fact that the firearm is to be first physically transferred to the police agency for an indefinite period of time.

On the other hand, if Mr. Fleming or the transferor were to identify the third-party rather than the police agency as the transferee on the transfer application to the BATF and, upon approval of the application, transfer the firearm to the police agency, there is little doubt that the mere possession of the unregistered firearm by the police agency would violate the penal provisions of the NFA since the National Firearms Registry would reflect the third-party as the possessor of the firearms. Under those circumstances, the police agency would

be an unregistered possessor of the regulated firearm in violation of 26 U.S.C. §§ 5812(b) and 5861(c).

The effect of the rule of law created by the court of appeals is patently unworkable and has a substantially pervasive effect on virtually every firearms transfer under the NFA regardless of whether a police agency is involved. As an example, one only needs to assume the exact scenario as set forth above with the only difference being that another private individual replaces the police agency as the intermediate transferee in the example. Removal of the motive of utilizing a police agency to effect a tax-exempt transfer does not change the result. In either instance, a person who transfers a firearm to another with knowledge that it may later be transferred to another person is destined to commit a crime because of the fact that there will be no legal means to effect the transfer. If the transferor identifies the third-party as the transferee and then delivers possession of the firearm to the intermediate transferee, a violation of §§ 5812(b) and 5861(c) occurs. If the transferor identifies the intermediate transferee as his transferee and the transferee later transfers to the third-party within a brief but as yet undefined period, the transferor will commit the offense (as Mr. Fleming stands convicted) of failing to identify the third-party as his transferee.

The final effect of the court of appeals' decision is to permit exactly what it seeks to prevent – the evasion of transfer taxes and the unregistered possession of firearms. For instance, if a transferor transfers a firearm to a transferee with full knowledge and intent that the transferee will transfer the firearm to a third-party within a reasonably brief period, the court of appeals' decision instructs that the transferor should identify the third-party as his transferee on his application for transfer to the BATF. If all of the parties to the transaction are private individuals, only one transfer tax will be paid whereas two deliveries of possession and, hence, transfers will occur. Accordingly, one of the transfer taxes can be lawfully avoided. Moreover, the firearm will remain in the unregistered possession of the intermediate transferee pending its delivery to the ultimate transferee. This is, of course, precisely what the NFA prohibits and stands as the cornerstone

of previous decisions of this Court. *See Staples v. United States*, 62 U.S.L.W. 4379 (U.S. May 24, 1994) ("The National Firearms Act makes it unlawful for any person to possess a machinegun that is not properly registered with the Federal Government").[1]

On the other hand, the only intellectually defensible answer to this problem is the one that Mr. Fleming and his counsel have consistently urged to the trial court in the first instance and later to the court of appeals. The answer is relatively simple inasmuch as it gives complete effect to the spirit and the letter of the NFA. Under Mr. Fleming's asserted position, every physical transfer of the firearm requires a separate, approved transfer by BATF since only then will the National Firearms Registry accurately reflect the possessor of the firearm.

This is what the letter and the spirit of the NFA already demands. In fact, the actual BATF Form 5 that was used to effect each of the subject transfers contains instruction No. 5 stating that "[i]f the firearm is to be transferred later by the new owner, a new application form covering the proposed transfer must be filed with the Director." (App., *infra*, 44a). In this case, Mr. Fleming made application to the BATF for approval of every firearm transfer made by him. No firearm was ever released to the possession of any other person by Mr. Fleming until after he had received notification by the BATF that the transfer had been approved.

The danger of this simple, intellectually accurate solution, according to the government, however, is that it will permit tax-exempt transfers of firearms by allowing transferors to use police agencies as "straw persons" to make an intermediate transfer of the firearm before it reaches the actual, intended third-party transferee. Admittedly, this result could occur if one is able to locate a police agency to

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[1] Ironically, Mr. Fleming testified as a defense expert witness at the trial giving rise to Mr. Staples' conviction that was reversed by this Court on May 24, 1994. Within weeks of giving such testimony, Mr. Fleming found himself the target of a criminal investigation by BATF.

willingly act as the "straw person." The danger of this result and its overall effect, however, is minor compared with the unpredictable, arbitrary prosecutions that will result from the rule of law derived from the court of appeals' decision. Moreover, the tax "loophole" that may exist can easily be remedied by either Congressional or administrative action through legislation or formal rule making procedures.

In light of the court of appeals' decision, various questions remain unanswered that will leave transferors of firearms subject to criminal prosecution. For instance, if a person transfers a firearm to a police agency (or other private individual) with the knowledge that the firearm will be transferred to a third-party in the future, how should that knowledge be reported on the transfer form. Of what significance is the fact that the police agency will continue to possess the firearm for one year? For one month? For one week? And of what significance is the fact that the police agency intends to test-fire the firearm? Or to evaluate the firearm for possible future purchases? Or to simply disassemble the firearm for inspection and training? Without a reversal of the decision of the court of appeals, these questions will go unanswered and many well-intentioned firearms owners will be subjected to criminal prosecution.

On the other hand, should this court grant certiorari and reverse the decision of the court of appeals, there will be no resulting effect on the regulatory scheme of the NFA. To the extent that such a decision would allow Mr. Fleming or others similarly situated to legally avoid the payment of the firearms transfer tax by utilizing a police agency as an intermediate transferee, it would not necessarily conflict with the recent teachings of this Court. In fact, only weeks after Mr. Fleming's conviction in the district court, this Court acknowledged in a strikingly similar case that the arrangement of one's affairs and conduct to avoid the payment of taxes is not inherently criminal.

> In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right. "Over and over again courts have said that there is nothing sinister in so arranging

> one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant."

United States v. Thompson/Center Arms Co., 112 S.Ct. 2102, 2106 n.4 (1992) (quoting *Commissioner v. Newman*, 159 F.2d 848, 850-51 (2d Cir.) (Hand, J., dissenting), *cert. denied*, 331 U.S. 859 (1947)).

As demonstrated herein, at a minimum, the court of appeals' decision potentially affects every transfer of a firearm to a police agency. In its broadest application, the court of appeals' decision affects every firearms transfer in the entire United States. For the reasons stated and to prevent selective, arbitrary criminal enforcement of the NFA, it is necessary for this Court to grant certiorari and reverse the decision of the court of appeals.

II. THE COURT OF APPEALS' DECISION APPEARS TO CONFLICT IN PRINCIPLE WITH RECENT DECISIONS OF THIS COURT

A. The Apparent Conflict in Principle Between the Decision of the Court of Appeals and *Cheek v. United States*.

Mr. Fleming was convicted of conspiring to make and of making false statements on BATF Forms 5 by falsely stating that he believed the transfers were exempt from the payment of transfer taxes and that the transferee was an exempt government agency. ("I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 [26 U.S.C. Chapter 53] on the firearm described herein for the . . . reason [that the] firearm is being transferred to or from a governmental entity."). In *Cheek v. United States*, 498 U.S. 192 (1991), this Court re-established the definition of the term "willfully" as applied in federal criminal tax statutes and the obligation of trial courts to instruct juries in tax

prosecutions regarding the mistaken but good-faith beliefs of taxpayers. The Court held that for the government to prove that the defendant's actions were willful, it must negate the defendant's good faith belief that he was not violating any of the provisions of the tax laws and that the courts must so instruct juries.

Uncertainty often arises due to the complexity of the tax system among taxpayers who earnestly wish to follow the law. *Cheek*, 498 U.S. at 205. It is not the purpose of the law to penalize innocent errors made despite the exercise of reasonable care. Although *Cheek* was decided in a case involving a prosecution relative to the payment of personal income taxes under 26 U.S.C. §§ 7201, 7203, there is nothing contained in *Cheek* that would lead one to believe that its application is limited only to personal income tax prosecutions. Moreover, the decisions of the courts of appeal suggest that the requirement of proof of willfulness is required in tax cases, generally, rather than tax cases arising solely under §§ 7201 and 7206 of the Internal Revenue Code.

For instance, in *United States v. Morris*, 20 F.3d 1111 (11th Cir. 1994), the court of appeals extended the application of *Cheek* to a case such as this in which the appellants' offenses were not evasion of taxes as in *Cheek* but, rather, the making of a false statement on a tax form. As in Mr. Fleming's case, the trial court in *Morris* gave general "willfulness" and "knowingly" instructions but failed to give a specific *Cheek*-type instruction. Holding that the general "willfulness" instruction given by the court "failed to adequately convey the properly asserted good-faith defense on which appellants relied," the court of appeals reversed the trial court's refusal to give a *Cheek*-type instruction. *Id.* at 1117.

By granting certiorari, this Court can not only resolve the conflict in principle between the decision of the court of appeals and this Court's decision in *Cheek*, but also the temporal reach of *Cheek* to other tax-related offenses such as those arising under the NFA. In the instant case, Mr. Fleming was convicted of violating § 5861(*l*) of the NFA, by causing false statements that the transfers of the instant firearms were not subject to the payment of transfer taxes. Mr. Fleming

presented evidence at trial that he had acted with a good-faith belief that he properly filled out the forms. Moreover, every alleged co-conspirator testifying for the government testified that they, too, believed that they had complied with the requirements of the law, that they had no agreement with Mr. Fleming to violate the law and that they had no intent to violate the law. Various testimony and evidence was received regarding the BATF's failure to publish any instructions to transferors regarding the taxability of transactions such as the ones at issue.

Mr. Fleming's conduct in this case is analogous to the conduct of the defendant in *Cheek* inasmuch as both cases involved duties arising under the Internal Revenue Code and the taxpayers' subjective good-faith belief in the legality of their conduct. Because of his good-faith belief that he was complying with the requirements of the Internal Revenue Code, of which the NFA is a part, Mr. Fleming asserted that his good-faith belief in the lawfulness of his actions constituted a defense to the allegations against him. Accordingly, Mr. Fleming submitted a *Cheek*-type willfulness instruction to the court for submission to the jury. Over Mr. Fleming's objection, the trial court refused to give the requested jury instruction or any other substitute *Cheek* instruction. Although the Court of Appeals for the Tenth Circuit has generally acknowledged and followed the reasoning of *Cheek*, *see United States v. Hernandez-Urista*, 9 F.3d 82 (10th Cir. 1993) ("[w]e recognize the existence of a good faith exception to this general rule [regarding proof of *mens rea*] in tax cases . . . "), it nonetheless affirmed the trial court's refusal to give a willfulness instruction. In light of this Court's decision in *Cheek* requiring the government to prove and the court to give a "willfulness" instruction in federal criminal tax prosecutions, Mr. Fleming asserts that the decision of the court of appeals conflicts in principle with *Cheek*.

According to the Indictment, the primary object of the conspiracies and the false statements of which Mr. Fleming was convicted was to avoid the payment of transfer taxes. The Indictment alleged that Mr. Fleming and others conspired to violate the NFA by effecting "straw" transfers of regulated

weapons to and from police agencies in order to avoid paying the $200 transfer tax. In this case, the only consequence of the statements on the BATF Forms 5 that Mr. Fleming submitted was to determine whether the transfers were exempt from the payment of the transfer tax. Clearly, the gravamen of the offenses charged was the illegal avoidance or evasion of the transfer taxes.

In *Cheek*, this Court reinforced its view that lack of "willfulness" is a defense in tax avoidance prosecutions. "Willfulness" in the context of a tax prosecution is "the voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201. In a criminal tax case, willfulness requires the government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. *Id.* at 202.

In his testimony, Mr. Fleming and others provided an evidentiary basis for his good faith belief in the truth of the statements made on the respective BATF Forms 5. The alleged co-conspirators also testified that they did not intend to violate the law. On the subject BATF Forms 5, Mr. Fleming stated only his "belief" that the transfers were tax-exempt which objectively resulted from his good-faith belief that the firearms were being transferred to the police agencies. Without a *Cheek* instruction, the jury was not instructed on one of Mr. Fleming's defenses and was permitted to convict him on a lesser standard than willfulness.

The importance of establishing a proper *mens rea* for offenses under the NFA was recently addressed in *Staples v. United States*, 62 U.S.L.W. 4379 (U.S. May 24, 1994). Previously, many circuits, relying on this Court's holding in *United States v. Freed*, 401 U.S. 601 (1971), had held that the government was required to prove only that the defendant had knowing possession of a firearm as understood in the general meaning of the term, but did not require any specific intent as to the other elements of the offense. Many innocent parties through ignorance or failure to investigate were subjected to the Act's harsh penalties under § 5871, up to ten years in prison, up to $10,000 fine, or both. In *Staples*, the Court held

that the penalty attached to the violation of § 5861(d) was especially harsh, indicating that Congress did not mean to dispense with a *mens rea* requirement. The government's interpretation of the statute potentially would impose criminal sanctions on a class of persons whose mental state – ignorance – makes their actions entirely innocent. *Staples*, 62 U.S.L.W. at 4383. The government ignores the particular care the Court has taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct." *Id.* at 4382.

Even though § 5861(*l*) is silent on whether the false statement must have been made willfully, far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978). In determining what level of mental culpability is appropriate, courts have examined the severity of the punishment authorized by the statute; the greater the possible punishment, the more likely some fault is required. *United States v. Garrett*, 984 F.2d 1402, 1412 (5th Cir. 1993).

In this case, it is unquestioned that the transfer taxes at issue amounted to a maximum of $2,000. Ironically, if Mr. Fleming had been convicted of evading personal income taxes in the same amount, he would face not more than six months in prison and would, in all likelihood, have received a probationary sentence. UNITED STATES SENTENCING GUIDELINES §§ 2T1.1, 2T4.1. Having been convicted of making a false statement on a tax form under the NFA, however, has subjected Mr. Fleming to a disproportionately harsh sentence of **forty-six months in prison.**

In the absence of express or implied congressional purpose to subject otherwise innocent transferors to the very serious penalties contained in § 5871, the rule of lenity should be applied in interpreting the *mens rea* requirement in § 5861(*l*). *United States v. Bass*, 404 U.S. 336, 347-49 (1971); *United States v. Williams*, 872 F.2d 773, 777 (6th Cir. 1989). Because of the draconian consequences of making a false statement as to the taxability of a firearms transfer, Mr. Fleming should not have been convicted absent proof of and

an instruction regarding "willfulness." Consequently, this Court should grant certiorari because of the apparent conflict in principle between the court of appeals' decision and this Court's decision in *Cheek*. By granting certiorari, this Court can decide whether the requirement of willfulness applies only to tax violations involving personal income taxes or to the broad range of duties applicable to the payment of taxes, generally, and/or to the duties applicable to payment of taxes under the NFA, specifically.

B. The Apparent Conflict in Principle Between the Decision of the Court of Appeals and *United States v. Thompson/Center Arms Co*.

On multiple occasions in the recent past, this Court has reviewed the application of the rule of lenity to ambiguous penal statutes. Two of the most recent cases involving the most expansive treatment of the rule of lenity are *United States v. Thompson/Center Arms Co.*, 112 S.Ct. 2102 (1992) and *Crandon v. United States*, 494 U.S. 152 (1990). Before explaining the apparent conflict between the principles set forth in those cases, however, a further reflection on the evidence in Mr. Fleming's case is helpful.

Mr. Fleming is a licensed importer, manufacturer and dealer in firearms and destructive devices. He operates a family firearms business with his wife and has successfully and lawfully completed thousands of firearms transfers over the last decade without incident. In the ordinary course of his business and because of his excellent reputation among law enforcement agencies, he routinely transfers firearms to and from law enforcement agencies.

As to the firearms ordered from Colt for the SPD, no physical transfer was made from Colt to the SPD until the transfer was approved by BATF. After approval, Colt sent the firearms *via* common carrier to the SPD and the firearms were released to Mr. Scribner, who was authorized by SPD Chief Hunter Mixon to take possession. Later, when the firearms were transferred to Mr. Fleming, physical possession of the firearms was not delivered until approval had been obtained

from BATF. In fact, count 5 of the Indictment was dismissed by the government when it belatedly learned that Mr. Fleming had affirmatively refused to take possession of the firearms before approval of the transfer to him. Consequently, the firearms were in the actual physical possession of the SPD's authorized representative for approximately 40 days.

The same is also true as to the firearms transferred to the SPD by George Gibbons. No physical delivery occurred until the transfer was approved by BATF. At that time, the firearms were delivered to the SPD. Only after the SPD applied and received approval for a transfer were the firearms transferred to third-parties. They were never transferred to Mr. Fleming.

As to the firearms for which Mr. Fleming received approval from BATF to transfer to the Creek County District Attorney's Office, Mr. Fleming testified that he had a good-faith belief that Mr. Scribner was authorized by the Creek County District Attorney's Office to receive possession of the firearms for delivery to it. After receiving the firearms, Mr. Scribner caused Assistant District Attorney Don I. Nelson (who was subsequently indicted and acquitted) to make application for transfer from the District Attorney's Office to Mr. Scribner and his friend, Clayton Badger.

In light of the fact that the NFA's statutory definition of the term "transfer" includes "loaning" and "otherwise disposing of" and the broad interpretation that courts have placed on that term, there is little doubt that the subject transactions constitute "transfers," that Mr. Fleming's belief that the transfers were non-taxable was made in good faith, *see Cheek v. United States*, 498 U.S. 192 (1991), and that the subject BATF Forms 5 contained no false statements. Consequently, Mr. Fleming's convictions should be set aside if his statements were either true or if the term "transfer" is ambiguous. *See Bifulco v. United States*, 447 U.S. 381 (1980).

Only weeks after Mr. Fleming's conviction in the district court, this Court decided the strikingly similar case of *Thompson/Center Arms*. In that case the Court held that the term "make" or "making" as used in § 5845(i) of the NFA was ambiguous thus requiring that the "rule of lenity" be invoked and requiring judgment in favor of Thompson/Center Arms.

As applied to this case, *Thompson/Center Arms* suggests that if the term "transfer" as used in § 5845(j) is ambiguous, Mr. Fleming's convictions must be reversed and the Indictment dismissed.

Thompson/Center Arms arose from a dispute as to the meaning of the term "make" and its derivatives under § 5845(j) of the NFA. Thompson/Center Arms was the maker of a "Contender" pistol and a conversion kit which could be used to convert the Contender into a long-barreled, non-regulated rifle or, alternately, into a short-barreled, regulated firearm under 26 U.S.C. § 5821. The BATF notified Thompson/Center Arms that when the kit was possessed with the Contender that a firearm had been "made" thus requiring the payment of the "making" tax. Thompson/Center Arms paid the tax and claimed a refund. BATF denied Thompson/Center Arm's claim for refund at which time it filed suit for a refund.

This Court granted certiorari to review a conflict in the circuits. Although three opinions were published debating whether the "making" of a firearm had occurred, the court held that the statutory definition of the term "making" was ambiguous. Despite the fact that plurality, concurring and dissenting opinions were published by the court, ***every member of this Court unanimously agreed*** that non-compliance with the NFA had criminal implications and that the rule of lenity required judgment in favor of Thompson/Center Arms.

Thompson/Center Arms was a civil case. At issue was a mere $200.00 in tax revenue. Nonetheless, Justice Souter, writing for the plurality, made the following observation:

> The consequence of being the maker of a firearm are [sic] serious. § 5821(a) imposes a tax of $200.00 "for each firearm made," which "shall be paid by the person making the firearm," § 5821(b). Before one may make a firearm, one must obtain the approval of the Secretary of the Treasury, § 5822, and § 5841 requires that the "manufacturer, importer, and maker . . . register each firearm he manufactures, imports or makes" in a central registry maintained by the Secretary of the Treasury. A

> maker who fails to comply with the NFA's provisions is subject to criminal penalties of up to 10 years' [sic] imprisonment and a fine of up to $10,000, or both, which may be imposed without proof of willfulness or knowledge. § 5871.

Thompson/Center Arms, 112 S.Ct. at 2104.

Despite apparent misgivings as to whether the rule of lenity should be applied to a civil tax case such as *Thompson/Center Arms*, Justice Stevens wrote that "[i]f this were a criminal case in which the defendant did not have adequate notice of the government's interpretation of an ambiguous statute, then it would be entirely appropriate to apply the rule of lenity." *Id.* at 2113 (Stevens, J., dissenting).

This is the type of case to which Justice Stevens referred. In fact, the circumstances of this case present a more compelling case for application of the rule of lenity. According to Justice Souter, "In 1985, the Bureau of Alcohol, Tobacco and Firearms advised Thompson/Center that when its conversion kit was possessed or distributed together with the Contender pistol, the unit constituted a firearm subject to the NFA." *Id.* at 2106. Likewise, according to Justice Stevens, "In 1985, the government properly advised respondent of its reading of the statute and gave it ample opportunity to challenge that reading in litigation in which nothing more than tax liability of $200.00 was at stake." *Id.* at 2116.

Not so in this case. BATF has never taken an official position as to whether a "transfer" actually occurs under the circumstances of this case. Moreover, BATF has never notified Mr. Fleming that it disagreed with his interpretation or that continued reliance on his interpretation might result in civil or criminal penalties.

The same result was reached by the Supreme Court in *Crandon v. United States*, 494 U.S. 152 (1990). In *Crandon*, another **corporate** citizen, the Boeing Company, paid five of its employees a total of $485,000 in severance benefits upon their departure from Boeing to enter the Executive Branch of the Federal Government. The government sued both the departed employees and Boeing for the value of the benefits paid under the theory that the money paid violated a provision

of the federal criminal code that prohibits private parties from paying, and government employees from receiving, supplemental compensation for the employee's service. Neither Boeing nor any of its departing employees were charged with criminal conduct. Finding in favor of Boeing and the employees, Justice Stevens, writing for the majority, stated:

> Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of § 209(a) remains, it should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent.

Id. at 153.

As in *Thompson/Center Arms*, every member of this Court agreed that the rule of lenity must be applied when an ambiguity exists in the interpretation of a penal statute. Although a three-member concurring opinion was written by Justice Scalia, it, too, recognized that the rule of lenity required judgment in favor of Boeing and its former employees.

> The second clause [of 18 U.S.C. § 209] as we have seen, is likewise entirely tied to *salary*. It would be bad construction to ignore this language (if it can be given reasonable meaning) in the interpretation of any statute; but it is particularly bad construction to ignore it in a criminal statute, where the rule of lenity applies.

Id. at 171.

As applied to this case, the rule of lenity requires reversal of Mr. Fleming's conviction for the following reasons. Mr. Fleming was convicted of two counts of conspiring to cause and one count of making false statements that the subject firearms transfers were not subject to the payment of transfer taxes. If the firearms were in fact "transferred" or if the term "transfer" as used in the NFA is ambiguous, it follows that the alleged false statements were not false. Since there can be no criminal conspiracy to make a true statement, it follows that

Mr. Fleming's convictions for conspiracy to make such statements would also require reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH A. WARD
Counsel of Record
TILLY & WARD
Two West Second Street
P.O. Box 3645
Tulsa, Oklahoma 74101-3645
(918)-583-8868

June 1994

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 92-5172
v.	)	
WILLIAM HUGH FLEMING, Defendant-Appellant.	)	(Filed Mar. 23, 1994)

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 91-CR-168-E)

Keith Ward, of Tilly & Ward, Tulsa, Oklahoma, for Defendant-Appellant.

Neal B. Kirkpatrick, Assistant United States Attorney (F.L. Dunn, III, United States Attorney, with him on the brief), Tulsa, Oklahoma, for Plaintiff-Appellee.

Before SEYMOUR, Chief Judge, MCWILLIAMS, and EBEL, Circuit Judges.

SEYMOUR, Chief Judge.

William Fleming appeals his convictions on two counts of conspiracy to violate the transfer tax provisions

of the National Firearms Act (NFA), I.R.C. §§ 5811, 5812, and one count of making false statements on required forms in order to avoid paying applicable transfer taxes, I.R.C. § 5861(1). The district court sentenced him to a term of forty-six months imprisonment and a $25,000 fine. Mr. Fleming contends, inter alia, that the district court should have granted him a judgment of acquittal; that the conspiracy counts are multiplicitous; that the government failed to comply with disclosure obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); that he was prejudiced by improper rebuttal evidence; and that the trial court erred in its instructions to the jury. We affirm.

I.

Sections 5811(a) and (b) of the NFA impose a tax of $200.00, payable by the transferor upon the transfer of any firearm. No firearm may be transferred under the Act until the transferor has filed an application for the transfer with the Bureau of Alcohol, Tobacco and Firearms (BATF), the application has been approved, and the tax has been paid. *See* I.R.C. § 5812. The NFA transfer tax is implemented by federal regulations. *See* 27 CFR §§ 179 *et seq.* (1993). Those regulations provide an exemption from the tax for certain government entities.

> A firearm may be transferred without payment of the transfer tax to or from any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

Id. § 179.90(a). The section further provides that a tax-exempt transfer must be made on a special application, the BATF Form 5. The transferor must check a box on this form describing the applicable category of tax-exempt sale and then sign the form. By signing the form, the transferor states that he has examined the application and found it to be true, correct and complete. Section 5861 of the NFA makes it unlawful for any person knowingly "to make, or cause the making of, a false entry on any application" required by the Act. I.R.C. § 5861(1).

Mr. Fleming was convicted on counts two, three, and eight of an eight count indictment. Count two of the indictment alleges that Mr. Fleming and others conspired to use a fictitious or "straw" transfer of machineguns to and from the Seminole, Oklahoma Police Department (SPD) in order to take advantage of the transfer tax exemption. George Gibbons, a gun collector, wanted to sell six machineguns, and Mr. Fleming agreed to find a buyer for them. Mr. Fleming later contacted Mr. Gibbons and told him that the SPD would take the guns. Mr. Fleming then sent Mr. Gibbons a completed Form 5 reflecting the tax-free transfer of the weapons. Mr. Gibbons signed it and sent in the forms. After the forms were approved, Mr. Gibbons shipped the guns to the SPD. The guns were received by then-Chief of the SPD, Hunter Mixon. Mr. Mixon delivered the guns to Stephen Scribner, a reserve police officer for the City of Drumright, Oklahoma, and former licensed firearms dealer. Later, Mr. Fleming located a purchaser for the firearms. The SPD applied to transfer the firearms to this purchaser. After

the applications were approved, the firearms were delivered to Mr. Fleming, who delivered them to the ultimate buyers.

Counts three and eight of the indictment involve the "straw" transfer of two Heckler and Koch MP5 SD machineguns and two silencers through the Creek County District Attorney's Office. Count three involved a conspiracy by Mr. Fleming and others to submit false and fraudulent BATF Form 5s in an attempt to avoid paying the transfer taxes. On paper, the firearms were transferred first to the Office of the District Attorney for Creek County, Oklahoma, and then to Mr. Scribner and Clayton Badger, an attorney in Drumright, Oklahoma. In reality, the firearms were delivered directly from Mr. Fleming to Mr. Badger and Mr. Scribner. No firearms were ever received or delivered by the Creek County District Attorney's Office. Count Eight involved the fraudulent execution of the Form 5s by Mr. Fleming. Mr. Badger and Mr. Scribner testified that they had agreed to buy the weapons from Mr. Fleming, and that the three men discussed ways to "paper" the firearms. Mr. Fleming prepared applications to transfer the firearms from himself to the Creek County District Attorney's Office, and Creek County Assistant District Attorney Don Nelson signed them. Mr. Fleming sent the applications to the BATF, which approved them. Mr. Fleming delivered the firearms directly to Mr. Badger and Mr. Scribner, and then prepared another set of Form 5s for the transfer of the weapons from the Creek County District Attorney's Office to Mr. Badger and Mr. Scribner.

II.

Mr. Fleming first asserts that the trial court erred in not granting him judgment of acquittal for three reasons: the evidence against him was insufficient as a matter of law; his prosecution was barred by the government's failure to comply with the Administrative Procedure Act (APA); and the rule of lenity should have been applied. We review a district court's order denying a motion for a verdict of acquittal under the same standard that court applied when considering the motion. *United States v. White*, 673 F.2d 299, 301 (10th Cir. 1982). All of the evidence must be reviewed in the light most favorable to the government, "recogniz[ing] the right of the jury to determine credibility and to find the facts." *Id.* The court may enter a judgment of acquittal only if the evidence that the defendant committed the crimes alleged is so meager that "no reasonable jury could find guilt beyond a reasonable doubt." *Id.*

Mr. Fleming argues that the evidence of his guilt was insufficient as a matter of law. He contends that all of the statements that he made on the BATF forms were literally true because the broad definition of transfer in the NFA encompasses "transfers" such as the ones to both the SPD and the Creek County District Attorney's Office. This definition states:

> The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

I.R.C. § 5845(j). He further argues that even if these firearms were transferred to the government entities to

avoid paying the transfer tax, neither the NFA nor any other provision of law makes such avoidance unlawful.

To support his argument, Mr. Fleming cites a passage in *Gregory v. Helvering*, 293 U.S. 465 (1935), that states:

> It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected [sic] within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded.

Id. at 468-69. Mr. Fleming's reliance on this case is misplaced because the Court also stated: "But the question for determination is whether what was done, apart from the tax motive was the thing which the statute intended." *Id.* at 469. In answering this question, the Court focused on substance over form and found that even though the whole transaction followed the literal requirements of the statute, it was nothing more than a sham. *Id.* at 470. "[T]he transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Id.*

After *Gregory*, courts have disallowed sham transactions in a variety of contexts. *See, Bobrer v. Commissioner*, 945 F.2d 344, 347 (10th Cir. 1991) (citing cases). We have clearly recognized that the substance of a tax transaction controls over the labels attached to it:

> Only a transaction that has "economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent consideration, and is not shaped solely by tax-avoidance features that have meaningless labels attached" will be recognized for tax purposes.

Jackson v. Commissioner, 966 F.2d 598, 600 (10th Cir. 1992) (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978)).

In the instant case, we look to the substance and not merely the form of the transfers. From the testimony given, a reasonable jury could decide that the alleged transfers to government agencies were sham transactions. In counts two and three, the jury was instructed that to find Mr. Fleming guilty, it had to find that he conspired to commit an offense "by means of false statements and improper registration to transfer . . . 'firearms' . . . without paying the transfer tax." Aplt. App., vol. I, exh. 3. In count 8, the jury was instructed that the elements of the offense were "the making or causing the making of false entries on BATF form 5s, applications and records required to be kept." *Id.* The jury was also given the definition of transfer set out in the NFA. The government framed its closing argument in terms of the transfer to the Seminole Police Department as being a "charade, an absolute and false charade." Aplt. App., vol. IV, doc. 25 at 1507.

The jury heard Mr. Scribner testify that the six machineguns were "transferred" to the Seminole Police Department so that Mr. Fleming could save $1200. Transcript of Jury Trial, vol. II, at 111. In addition, Mr. Badger

testified that the two Heckler and Koch machineguns and silencers were merely "papered" through the Creek County District Attorney's office and that the office never had physical possession of them. *Id.*, vol. III, at 402. He further testified that this transaction was done to avoid paying the transfer tax. *Id.* at 403.

Under the plain meaning of the regulation, the exemption from the tax was written so that government entities would not have to pay tax when selling or acquiring firearms. Allowing an exemption for any person who has a contact with such a government entity to transfer firearms through that contact solely to avoid tax liability is beyond the plain intent of the regulation. Because there was sufficient evidence that the transactions were shams, there was sufficient evidence to convict Mr. Fleming on all three counts.

Mr. Fleming's arguments that his convictions should be reversed because the government did not comply with the APA or because the rule of lenity should be applied, likewise fail. Under the provisions of the APA, agencies must promulgate and publish certain rules and other actions before they can be enforced against individuals. *See* 5 U.S.C. § 552. Fleming asserts that the " 'theory' of liability BATF seeks to impose is an agency 'rule' requiring publication under the APA." Aplt. Brief at 18. He claims that the information that he put on the BATF Forms was literally correct; therefore, he did not violate any existing regulation or regulatory policy. Thus, he argues, his prosecution necessarily includes some violation not included in the applicable regulations.

The government notes correctly, however, that Mr. Fleming was "not convicted of a regulatory violation" which would give rise to the application of the APA. Aplee. Brief at 19. He was convicted of a "series of statutory violations, including conspiracy and causing and making false statements." *Id.* No regulation is necessary to state that the exception to the imposition of a transfer tax does not include sham transfers made solely to avoid the imposition of the tax. Moreover, the regulation providing the tax exemption at issue here specifically directs the transferor to "satisfy himself of the claimed exempt status of the transferee *and the bona fides of the transaction.*" 27 C.F.R. § 179.90(e) (emphasis added).

Similarly the rule of lenity is not applicable to this case. The term "transfer" as used in the NFA is not ambiguous as required by the rule. *See Bifulco v. United States,* 447 U.S. 381, 387 (1980). Sham transfers are not transfers under any definition of the term. There was sufficient evidence for the jury to find that the "transfers" at issue were not "transfers" at all but were sham transactions set up solely to avoid the payment of the transfer tax.

III.

Mr. Fleming also argues that counts two and three of the indictment are multiplicitous. "[M]ultiplicity refers to multiple counts of an indictment which cover the same criminal behavior." *United States v. Dashney,* 937 F.2d 532, 540 n. 7 (10th Cir. 1991). In *United States v. Swingler,* 758 F.2d 477 (10th Cir. 1985), we addressed a similar claim that defendants were being charged in more than one

count for a single conspiracy. We stated there that " '[w]hen . . . the separate conspiracies are both founded upon a general conspiracy statute, the relevant inquiry is whether there existed more than one *agreement* to perform some illegal act or acts.' " *Id.* at 491-92 (quoting *Ward v. United States*, 694 F.2d 654, 661 (11th Cir. 1983)).

The existence of one or multiple conspiracies is ordinarily a fact question. *Id.* at 492. While Mr. Fleming did raise the multiplicity issue pretrial, he did not request the court to instruct the jury that it had to find two separate conspiracies in order to convict on both counts. On the contrary, the court instructed the jury that each count charged a separate crime. This instruction was substantially similar to one proposed by Mr. Fleming. Accordingly, to the extent that Mr. Fleming has preserved this issue for appeal at all, we review the indictment for multiplicity on its face as a matter of law.

Examination of the indictment does not support Mr. Fleming's contention that the counts were multiplicitous. Counts two and three involved separate agreements to perform separate acts to violate the same laws. Count two involved a conspiracy between Mr. Fleming and others to "transfer" Mr. Gibbons' machinegun collection to a buyer through the Seminole Police Department. Count three involved a conspiracy between Mr. Fleming, Mr. Scribner, Mr. Badger and others to "paper" two HK MP5 SD machineguns and two silencers through the Creek County District Attorney's Office. The two conspiracy counts thus relate to two separate courses of conduct. The counts are therefore not multiplicitous on their face.

IV.

Mr. Fleming contends that the government failed to comply with the disclosure obligations imposed by *Brady v. Maryland*, 373 U.S. 83 (1963). Whether the government was required to disclose certain evidence under *Brady* is a mixed question of law and fact which we review *de novo*. *United States v. Buchanan*, 891 F.2d 1436, 1440 (10th Cir. 1989). Due process requires that the government disclose to the accused all evidence that is both exculpatory and material. *Brady*, 373 U.S. at 87. Where a witness' credibility is material to the question of guilt, the disclosure obligation includes impeaching information. *Buchanan*, 891 F.2d at 1443. Evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

On appeal, Mr. Fleming argues that the government committed several *Brady* violations. Many of these alleged violations concern evidence that either does not exist or that is patently not material. Accordingly, the only issues we address are the government's alleged nondisclosure of evidence that BATF agents destroyed at least one statement by Mr. Scribner, and evidence of "other subterfuges" by Mr. Mixon, Mr. Scribner, and Mr. Badger against other firearms dealers. In response to Mr. Fleming's post-trial motion raising these issues, the district court held that no constitutional violations had occurred, and that even in the aggregate the alleged errors did not have a "substantial influence on the outcome of the trial." Dist. Ct. Rec., file 2, doc. 117.

Mr. Fleming claims that BATF agents destroyed at least one hand-written statement by Mr. Scribner before Agent Blair Ward wrote the statement that Mr. Scribner signed. The government argues that Agent Ward's first attempt to take Mr. Scribner's written statement was abandoned because of a time constraint, and that there is no evidence that any statements made were exculpatory. We agree with the district court that the failure of the government to preserve or disclose any previously written statements by Mr. Scribner does not amount to a *Brady* violation. The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard. *United States v. Fletcher,* 801 F.2d 1222, 1225 (10th Cir. 1986). Absent a showing of police or prosecutorial misconduct, missing evidence is considered material only if the exculpatory value of the evidence was apparent before the evidence was destroyed, and the defendant was "unable to obtain comparable evidence by other reasonable comparable means." *Id.* (quoting *California v. Trombetta,* 467 U.S. 479, 489 (1984)). The defendant bears the burden of showing bad faith on the part of the government when evidence is destroyed. *United States v. Molina-Cuartas,* 952 F.2d 345, 349-50 (10th Cir. 1991). Mr. Fleming has not made the requisite showing of bad faith. In addition, he has not established that any previous statement was exculpatory, or that he was unable to obtain comparable evidence. It is also clear that he knew about Mr. Scribner's previous statements before trial. During trial, Mr. Fleming questioned Mr. Scribner about the destruction of the earlier statement. Transcript of Jury Trial, vol. III, at 341-42. He could have also asked Mr. Scribner about the contents of any previous statements,

or about the truth of the one he signed. In addition, Mr. Fleming could have called Agent Ward to testify about the incident, but did not.

Mr. Fleming also argues that the government withheld evidence of similar schemes perpetrated by Mr. Mixon, Mr. Scribner, and Mr. Badger against other firearms dealers. Prior to trial, Mr. Fleming received the investigatory statements and grand jury testimony of Mr. Mixon and Mr. Badger, and the investigatory statement of Mr. Scribner. In addition, Mr. Fleming's counsel spent several days with the case agent and the entire prosecution file. Mr. Fleming also questioned Mr. Scribner during trial about his involvement in similar schemes. We therefore hold that the district court was correct in finding that the alleged *Brady* violations were not material.

V.

Mr. Fleming argues that he was unfairly prejudiced by rebuttal evidence admitted in violation of Federal Rule of Evidence 608(b). This rule precludes the admission of extrinsic evidence of specific instances of conduct of the witness when offered for the purpose of attacking credibility. The rule does not apply, however, when extrinsic evidence is used to show that a statement made by a defendant on direct examination is false, even if the statement is about a collateral issue. *See* 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6096 at 546-47 (1990). A defendant may not make false statements on direct examination and rely on the government's inability to challenge his credibility as to the truth

of those statements. *See Walder v. United States*, 347 U.S. 62, 65 (1954).

In the instant case, the government's rebuttal witness, Patrick McGuire, testified that specific statements made by Mr. Fleming on direct examination were false. The trial court may admit this evidence subject only to the limitations of Federal Rule of Evidence 403, under which evidence may be excluded when its probative value is outweighed by the danger of unfair prejudice. We generally review the trial court's decision to admit evidence under this rule for abuse of discretion. *See United States v. Rackstraw*, 7 F.3d 1476, 1482 (10th Cir. 1993). Because Mr. Fleming did not object on Rule 403 grounds at trial, however, we review his claim only for plain error. *Id.* After examining Mr. McGuire's testimony, we hold that the district court's admission of this evidence during rebuttal was not plainly erroneous.

VI.

Mr. Fleming's argument that the trial court erred in its instructions to the jury is similarly without merit. The court rejected Mr. Fleming's request for an instruction, based on *Cheek v. United States*, 498 U.S. 192 (1991), that would have required the jury to find he conspired to willfully evade the transfer tax. The government opposed the instruction because Mr. Fleming was not charged with tax evasion in the classic sense, but with making false statements on BATF forms in order to avoid paying a tax. The district court agreed with the government and did not use the words "willful" or "evade" in the jury instructions.

On appeal, Mr. Fleming relies on *Cheek* and *United States v. Thompson/Center Arms*, 112 S.Ct. 2102 (1992), to argue that tax avoidance is lawful, and that only tax evasion is a crime. Therefore, he contends, he must have been convicted of tax evasion, and the court's failure to instruct the jury that good faith negates willful evasion was erroneous. We disagree. Mr. Fleming was charged with conspiring, through the use of false statements on BATF forms, to transfer machineguns without paying the transfer tax. Because his crime was not merely evading the payment of taxes, but setting up sham transactions in order to mislead the BATF, the district court did not err in refusing to instruct the jury on the elements of willful tax evasion.

We have reviewed Mr. Fleming's other arguments and conclude they do not constitute reversible error. Mr. Fleming's conviction is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN District of OKLAHOMA

(Filed Aug. 19, 1992)

UNITED STATES OF AMERICA V. William Hugh Fleming (Name of Defendant)	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987) Case Number: 91-CR-168-001-E Keith Ward Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____

[X] was found guilty on count(s) Two, Three, and Eight of the Superseding Indictment after plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:371	Conspiracy	September 1990	Two
18:371	Conspiracy	January 1991	Three
26:5861(d)	Receiving, Possessing Firearm Illegally	February 1990	Eight

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found mistrial on count(s) One, Four, and Six of the Superseding indictment and is discharged as to such count(s).

[X] Count(s) Five & Seven of the Superseding indictment were dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $150, for count(s) Two, Three, and Eight of the Superseding Indictment which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
446-52-6038

Defendant's Date of Birth:
10-07-49

Defendant's Mailing Address:

7720 E. 126th St. North
Collinsville, OK 74021

Defendant's Residence Address:

August 13, 1992
Date of Imposition of Sentence

/s/ James O. Ellison
Signature of Judicial Officer

James O. Ellison, Chief
U. S. District Judge
Name & Title of Judicial Officer

Aug. 18, 1992
Date

Defendant: William Hugh Fleming
Case Number: 91-CR-168-001-E

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 46 months as to Counts Two, Three, and Eight of the Superseding Indictment, to run concurrently.

Execution of sentence stayed pending appeal. Defendant shall remain free pending execution of $100,000 bond secured by real property.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m. / p.m. on ___.

[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on ___.

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to ___ _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years as to Counts Two, Three, and Eight to run concurrently .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[X] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendants shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled

substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall submit to urinalysis testing as directed by the U. S. Probation Office.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM HUGH FLEMING, Defendant.	No. 91-CR-168-E **SUPERSEDING INDICTMENT** [18 U.S.C. § 371: Conspiracy; 26 U.S.C. § 5861: Receiving, Possessing Firearm Illegally; 18 U.S.C. § 922(o): Possession of a Machinegun] (Filed March 6, 1992)

THE GRAND JURY CHARGES:

COUNT ONE

[18 U.S.C. § 371]

Beginning in or about March, 1988, and continuing thereafter until in or about September, 1990, in the Northern District of Oklahoma, and elsewhere, WILLIAM HUGH FLEMING, defendant herein, (hereafter, "FLEMING"), along with unindicted co-conspirators Hunter Mixon (hereafter, "Mixon"), and Stephen W. Scribner (hereafter, "Scribner"), and other persons known to the Grand Jury, knowingly and willfully conspired to commit offenses against the United States which were in violation of Title 26, United States Code, Sections 5811, 5812, 5861(b), 5861(d), 5861(e) and 5861(1), and Title 18, United States Code, Sections 922(a)(6), and 924(a), all in violation of Title 18, United States Code, Section 371, as follows:

Object of the Conspiracy

It was the object of the conspiracy that FLEMING, along with unindicted co-conspirators, for profit, would obtain, transfer, receive and possess firearms, namely, grenade launchers, without proper registration and without paying applicable transfer taxes and fees.

Introduction

1. At all times pertinent hereto, unindicted co-conspirator Hunter Mixon (hereafter, "Mixon), was employed as the Chief of Police of the City of Seminole, Oklahoma.

2. At all times pertinent hereto, defendant, WILLIAH [sic] H. FLEMING (hereafter, "FLEMING") was engaged in the business of manufacturing and selling firearms, machineguns, and explosive devices, and was licensed to do so agencies of the United States.

3. At all times pertinent hereto, Colt's Manufacturing Company, Incorporated, was a manufacturer of firearms, including M-203 40 mm grenade launchers.

4. At all times pertinent hereto, Colt's Manufacturing Company had in effect a policy which would only allow any sale of M-203 40mm grenade launchers to bona fide firearms dealers, and then only on behalf of law enforcement agencies.

5. At all times pertinent hereto, Colt M-203 40mm grenade launchers were "firearms" as defined in Title 26, United States Code, Section 5845.

6. At all times pertinent hereto, under the provisions of Title 26, United States Code, Sections 5811 and 5812, no firearm could be transferred without payment of a transfer tax of $200.00, payable by the transferor before any firearm could change hands.

7. At all times pertinent hereto, transfers of firearms to or from government agencies, including the City of Seminole, Oklahoma Police Department, were exempt from payment of the transfer tax imposed by Title 26, United States Code, Sections 5811 and 5812.

Means of the Conspiracy

FLEMING, along with other unindicted co-conspirators and other persons known to the Grand Jury, employed the following means to carry out the conspiracy alleged hereby:

1. With the knowledge and consent of FLEMING, Scribner would obtain from Mixon official stationery of the City of Seminole, Oklahoma.

2. Thereafter, Scribner would obtain the signature of Mixon on such stationery. With the knowledge and consent of FLEMING, Scribner would falsely use such stationery to place fraudulent orders with authorized Colt's distributors for grenade launchers, purportedly for the use of the Seminole, Oklahoma Police Department. In fact, as Scribner and FLEMING well knew, no grenade launchers were ever authorized by nor intended for the use of the Seminole, Oklahoma Police Department.

3. As a result of the actions of FLEMING, Scribner and other co-conspirators as set forth hereinabove, Colt's

Manufacturing would prepare and submit official transfer forms, incorrectly reflecting that the sale of said weapons was not subject to taxes or transfer fees.

4. After fraudulently securing delivery of such machineguns and other regulated firearms, FLEMING and Scribner would obtain the signatures of Mixon on official transfer forms, falsely representing that a subsequent transfer of said weapons to Scribner and FLEMING was exempt from the payment of taxes and fees. Thereafter, Scribner and FLEMING would transfer such grenade launchers themselves and other private entities or persons, who would pay the defendants premium prices for obtaining the grenade launchers.

Overt Acts

In furtherance of the conspiracy and to accomplish its objects, FLEMING and Scribner, along with other unindicted coconspirators, committed the following overt acts, at the times and places set forth below:

1. In or about March, 1988, Scribner met with FLEMING in Tulsa, Oklahoma, in the Northern District of Oklahoma. The purpose of that meeting was to plan a scheme to unlawfully acquire of M-203 40 mm grenade launchers, from Colt's Manufacturing Company, Incorporated, of Hartford, Connecticut, a licensed manufacturer of firearms.

2. Sometime between March, 1988 and February, 1989, the exact date being unknown to the Grand Jury, with the knowledge and consent of FLEMING, Scribner met with Mixon at Seminole, Oklahoma. The purpose of

that meeting was to discuss using the Seminole, Oklahoma Police Department to obtain the said grenade launchers, in in [sic] orderto [sic] illegally avoid the payment of transfer fees and taxes.

3. After the meeting described in the preceding paragraph, Mixon furnished Scribner several blank sheets of official stationery of the City of Seminole, Oklahoma, knowing that Scribner intended to use the stationery to place fraudulent orders for grenade launchers.

4. On or about February 8, 1989, with the knowledge and consent of FLEMING, on the official Seminole, Oklahoma stationery described hereinabove and purportedly in the name and for the use of the Seminole Police Department, Scribner fraudulently prepared and submitted an order to Southwest Shooter's Supply, Oklahoma City, Oklahoma, a licensed distributor of firearms, for the supposedtax [sic] exempt purchase of six (6) Colt M-203 40 mm grenade launchers.

5. On or about August 29, 1989, again using Seminole, Oklahoma stationery as described hereinabove, with the knowledge and consent of FLEMING, Scribner fraudulently prepared and submitted an order for twelve (12) more Colt M-203 40 mm grenade launchers with Southwest Shooter's Supply.

6. On or about April 10, 1990, Scribner arranged to receive the eighteen (18) grenade launchers. At or about the same time, Scribner advised FLEMING to prepare the official documentation to falsely show that the said grenade launchers were being transferred from the Seminole, Oklahoma Police Department to FLEMING.

7. On or about April 11, 1990, Scribner delivered seventeen (17) of the said grenade launchers to FLEMING at FLEMING'S place of business in the Northern District of Oklahoma.

8. Sometime between April 10, 1990 and April 24, 1990, at the direction of Scribner and with the knowledge and consent of FLEMING, Mixon signed eighteen (18) ATF Forms 5, falsely showing that seventeen (17) of the said grenade launchers were to be transferred from the Seminole, Oklahoma Police Department to FLEMING FIREARMS; one (1) grenade launcher was to be transferred from the Seminole, Oklahoma Police Department to Scribner. FLEMING caused these documents to be forwarded to the United States Bureau of Alcohol, Tobacco and Firearms for approval.

COUNT TWO

[18 U.S.C. § 371]

Beginning in or about January of 1990, and continuing thereafter until September, 1990, in the Northern District of Oklahoma, and elsewhere, the defendant, WILLIAM HUGH FLEMING (hereafter, "FLEMING"), and other persons known to the Grand Jury, knowingly and willfully conspired to commit offenses against the United States which were in violation of Title 26, United States Code, Sections 5811, 5812, 5861(b), 5861(d), 5861(e) and 5861(l), and Title 18, United States Code, Sections 922(a)(6), 922(o), and 924(a), all in violation of Title 18, United States Code, Section 371, as follows:

Object of the Conspiracy

It was the object of the conspiracy that, FLEMING and others would acquire and transfer, for profit, six (6) machineguns of various makes, all firearms within the meaning of the National Firearms Act, without registration and without paying applicable transfer taxes.

Introduction

1. At all times pertinent hereto, defendant WILLIAM H. FLEMING (hereafter, "FLEMING") was engaged in the business of manufacturing and selling machineguns and other regulated firearms, in the Northern District of Oklahoma and elsewhere.

2. At all times pertinent hereton [sic], unindicted co-conspirator Stephen W. Scribner (hereafter, "Scribner"), was associated with FLEMING in the sale of firearms.

3. At all times pertinent hereto, unindicted co-conspirator Hunter Mixon (hereafter, "Mixon") was the Chief of Police of the City of Seminole, Oklahoma.

4. At all times pertinent hereto, George Gibbons was a private collector of firearms, including machineguns, in Corpus Christi, Texas.

5. At all times pertinent hereto, machineguns were "firearms" as defined in Title 26, United States Code, Section 5845.

6. At all times pertinent hereto, under the provisions of Title 26, United States Code, Sections 5811 and 5812, no firearm could be transferred without payment of

a transfer tax of $200.00, payable by the transferor before any firearm could change hands.

7. At all times pertinent hereto, legitimate transfers of firearms to or from government agencies, including the City of Seminole, Oklahoma Police Department, were exempt from payment of the transfer tax imposed by Title 26, United States Code, Sections 5811 and 5812.

Means of the Conspiracy

FLEMING, along with the unindicted co-conspirators and other persons known to the Grand Jury, employed the following means to carry out the conspiracy alleged hereby:

1. With the knowledge and consent of the other co-conspirators, FLEMING would falsely arrange to purchase six machineguns of various makes from Gibbons, purportedly for and on behalf of the City of Seminole, Oklahoma Police Department. As defendant FLEMING and the co-conspirators well knew, neither the purchase nor use of such weapons had ever been authorized by that City.

2. Based on the false representations of FLEMING as set forth in the preceding paragraph, Gibbons would prepare and submit official transfer forms for said machineguns, fraudulently reflecting that the transfer was tax-exempt.

3. After said machineguns arrived at the Seminole, Oklahoma Police Department, Mixon would telephone Scribner and arrange to deliver said machineguns to Sribner [sic] at Drumright, Oklahoma.

4. Subsequently, Scribner would deliver said machineguns to FLEMING. FLEMING would prepare official transfer forms, falsely and fraudulently representing that said machineguns were to be transferred from the City of Seminole, Oklahoma to other purchasers. At or about the same time, FLEMING sold said machineguns to said other purchasers, the names of whom are known to the Grand Jury.

5. At the behest of Scribner and with the knowledge and consent of FLEMING, Mixon would sign the official transfer forms prepared by FLEMING and described in the preceding paragraph. Thereafter, FLEMING submitted said fraudulent forms to the Bureau of Alcohol, Tobacco, and Firearms for approval.

Overt Acts

In furtherance of the conspiracy and to accomplish its objects, FLEMING, along with Scribner and the unindicted co-conspirators, committed the following overt acts, at the times and places set forth below:

1. Sometime between January, 1990 and August 16, 1990, the precise date of which is unknown to the Grand Jury, Scribner met FLEMING in the Northern District of Oklahoma. The purpose of the meeting was to plan a scheme to purchase from George Gibbons, without proper registration or payment of applicable transfer taxes, six (6) various make machineguns, and then to sell those machineguns to other purchasers, again without payment of federally required transfer taxes and fees.

2. Between January, 1990 and August 16, 1990, the precise date being unknown to the Grand Jury, Scribner, with the knowledge and consent of FLEMING, met with Mixon. The purpose of the meeting was to discuss fraudulently using the Seminole, Oklahoma, Police Department to obtain the various machineguns described in the preceding paragraph, thereby avoiding registration and the payment of required federal transfer fees and taxes.

3. Sometime between January 1990 and prior to June 5, 1990, the precise date being unknown to the Grand Jury, in reliance upon the fraudulent representations of FLEMING, Gibbons applied to the Bureau of Alcohol, Tobacco, and Firearms for the tax exempt transfer of the six (6) machineguns hereinabove stated, from Gibbons to the City of Seminole, Oklahoma Police Department.

4. Between July 5, 1990, and August 16, 1990, in Tulsa, Oklahoma, in the Northern District of Oklahoma, Scribner physically delivered the six (6) machineguns described above to FLEMING.

5. Between July 5, 1990 and August 16, 1990, at the behest of Scribner and FLEMING, Mixon signed six (6) ATF Forms 5, falsely representing that the six (6) machineguns were to be transferred from the Seminole, Oklahoma Police Department to other persons. FLEMING caused these documents to be forwarded to the United States Bureau of Alcohol, Tobacco and Firearms for approval.

All in violation of Title 18. United States Code, Section 371.

COUNT THREE

[18 U.S.C. § 371]

Beginning in or about December, 1989, and continuing thereafter until on or about January, 1991, in the Northern District of Oklahoma and elsewhere, WILLIAM HUGH FLEMING, defendant herein, along with unindicted co-conspirators Stephen W. Scribner (hereafter "Scribner") and Clayton Badger (hereafter "Badger"), and other persons known to the Grand Jury, knowingly and willfully conspired to commit offenses against the United States which were in violation of Title 26, United States Code, Sections 5811, 5812, 5861(b), 5861(d), 5861(e), 5861(l), and 5871, and Title 18, United States Code, Sections 922(o), and 924, as follows:

Object of the Conspiracy

1. It was an object of the conspiracy that FLEMING and the unindicted co-conspirators, knowingly and willfully would obtain, receive, possess and transfer, for profit, two HK MP5SD machineguns and two silencers, without paying federally required taxes.

2. It was further an object of the conspiracy that FLEMING and the unindicted co-conspirators, knowingly and willfully would transfer and receive the said machineguns and silencers without paying the applicable transfer taxes thereon.

Introduction

1. At all times pertinent hereto, FLEMING was engaged in the business of manufacturing and selling

machineguns and other regulated firearms, in the Northern District of Oklahoma and elsewhere.

2. At all times pertinent hereto, Scribner was associated with FLEMING in the sale of firearms.

3. At all times pertinent hereto, Badger was a private collector of firearms, including machineguns, in Drumright, Oklahoma.

4. At all times pertinent hereto, machineguns and silencers were "firearms as defined in Title 26, United States Code, Section 5845.

6. At all times pertinent hereto, under the provisions of Title 26, United States Code, Sections 5811 and 5812, no firearm could be transferred without payment of a transfer tax of $200.00, payable by the transferor before any firearm could change hands, with certain exceptions.

7. At all times pertinent hereto, legitimate transfers of firearms to or from government agencies, including the Creek County, Oklahoma District Attorney's Office were exempt from payment of the transfer tax imposed by Title 26, United States Code, Sections 5811 and 5812.

Means of the Conspiracy

FLEMING, along with other unindicted co-conspirators and other persons known to the Grand Jury, employed the following means to carry out the conspiracy alleged hereby:

1. With the knowledge and consent of Scribner, FLEMING would arrange to fraudulently sell Scribner and Badger each an HK MP5SD machinegun with a

silencer, without payment of the required federal transfer tax and fee.

2. With the knowledge and consent of Scribner, FLEMING would prepare and submit official transfer forms for the two HK MP5SD machineguns and silencers falsely representing the transfer of said firearms to be from FLEMING to the Creek County District Attorney [sic] Office, when in fact and well knowing that the Creek County District Attorney's Office had never authorized the purchase or use of such weapons and silencers.

3. Scribner, with the knowledge and consent of FLEMING and Badger would obtain the signature of an Assistant District Attorney for Creek County, Oklahoma, on the official transfer form for said HK MP5SD machineguns and silencers falsely representing the transfer of the said machineguns and silencers to be from the Creek County District Attorney's Office to Scribner and Badger.

4. With the knowledge and consent of Scribner and Badger, the official transfer forms referred to above, would be submitted by FLEMING to the Bureau of Alcohol, Tobacco and Firearms.

Overt Acts

In furtherance of the conspiracy and to accomplish its objects, FLEMING and the unindicted co-conspirators, committed the following overt acts at the times and places set forth below:

1. Between in or about December, 1989, and February 9, 1990, the exact date being unknown to the Grand

Jury, in the Northern District of Oklahoma, Scribner met FLEMING and Badger to discuss ways in which Scribner and Badger could purchase from FLEMING two HK MP5SD machine guns and two silencers, all of which were at that time in FLEMING's inventory of weapons for sale, without having to pay federally required transfer taxes. At or about the same time, FLEMING delivered one each of the said machineguns and silencers to Scribner and Badger.

2. Following the meeting described in the preceding paragraph, and before February 9, 1990, Badger met with an Assistant District Attorney for Creek County, Oklahoma in Drumright, Oklahoma, in the Northern District of Oklahoma. At that meeting, Badger and said Assistant District Attorney discussed using the Creek County, Oklahoma District Attorney's Office to fraudulently effect the tax-exempt transfer of said machineguns and silencers to Badger and Scribner.

3. On or about February 9, 1990, FLEMING prepared and submitted, or caused to be prepared and submitted, to the Bureau of Alcohol, Tobacco and Firearms, four ATF Form 5's falsely applying for the tax-exempt transfer of said machineguns and silencers from FLEMING to the Creek County, Oklahoma District Attorney's Office.

4. Between February 9, 1990, and in or about May 1990, the exact date being unknown to the Grand Jury, at the behest of Badger, and with the knowledge of Scribner and FLEMING, the Assistant District Attorney for Creek County, Oklahoma fraudulently executed four ATF Form 5's for the tax-exempt transfer of said machineguns and

silencers from the Creek County, Oklahoma District Attorney's Office to Badger and defendant Scribner.

All in violation of Title 18, United States Code, Section 371.

COUNT FOUR

[26 U.S.C. § 5861(l)]

In or about April, 1990, in the Northern District of Oklahoma, WILLIAM HUGH FLEMING, defendant herein, and other persons known to the Grand Jury, knowingly made or caused to be made false entries on applications required by Chapter 53 of Title 26, United States Code, Sections 5811 and 5812, to-wit: Blocks One and Two (A) of the certifications of tax exemption forms (ATF Form 5) for the transfer of eighteen (18) Colt M-203 40 mm grenade launchers, in that the defendant stated in Block One of said applications that the transfer of certain grenade launchers was not subject to federally required transfer taxes, and in Block Two (A) that the City of Seminole, Oklahoma Police Department was the transferee of said grenade launchers, knowing such entries to be false, in violation of Title 26, United States Code, Sections 5861(l), and 5871.

COUNT FIVE

[26 U.S.C. § 5861(d)]

On or about the 11th day of April, 1990, in the Northern District of Oklahoma, the defendant, WILLIAM HUGH FLEMING, defendant herein, willfully received and possessed firearms, to-wit: Seventeen (17) Colt M-203

grenade launchers, serial numbers 0175442, 0175458, 0175465, 0175471, 0175492, 0175502, 0175518, 0175519, 0175539, 0175556, 0175845, 0175856, 0175873, 0175917, 0175921, 0175957, and 0175967, which firearms had not been registered to the defendant in the National Firearms Registration and Transfer Record, as required under the provisions of Chapter 53 of Title 26, United States Code, Section 5812 (b), in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT SIX

[26 U.S.C. § 5861(l)]

In or about August, 1990, in the Northern District of Oklahoma, the defendant, WILLIAM H. FLEMING, defendant herein, and other persons known to the Grand Jury, knowingly made or caused to be made false entries on applications required by Chapter 53 of Title 26, United States Code, Sections 5811 and 5812, to-wit: Blocks One and Two (A) of the certification of tax exemption (ATF Form 5) for the transfer of six machineguns in that the defendant stated in Block One of said applications that the transfers of six machineguns was not subject to federally required transfer taxes, and in Block Two (A) of said applications that the transferee of said machineguns was the City of Seminole, Oklahoma, knowing such entries to be false, in violation of Title 26, United States Code, Sections 5861(l) and 5871.

COUNT SEVEN

[18 U.S.C. § 922(o)]

Between in or about July 1990, and in or about September 1990, in the Northern District of Oklahoma, the defendant, WILLIAM HUGH FLEMING, willfully and knowingly received and possessed machineguns, to-wit: one (1) AMT .308 caliber machine gun, serial number 20085; one (1) Colt AR-15-SP1 .223 caliber machinegun, serial number SP 49808; one (1) Steyr AUG .223 caliber machinegun, serial number 900SA760; one (1) HK94 9mm caliber machinegun, serial number 7672; one (1) Uzi B 9mm caliber machinegun, serial number SA61663, and one (1) Colt AR-15 A2-SPZ .223 caliber machinegun, serial number SP 306727, in violation of Title 18, United States Code, Section 922(o) and 924(a).

COUNT EIGHT

[26 U.S.C. § 5861(l)]

From in or about January 1990 to February 1990, in the Northern District of Oklahoma, the defendant, WILLIAM H. FLEMING, and other persons known to the Grand Jury, knowingly made or caused to be made false entries on applications required by Chapter 53 of Title 26, United States Code, Sections 5811 and 5812, to-wit: Blocks One and Two (A) of the certification of tax exemption forms (ATF Form 5) for the transfer of two HK machineguns and two silencers, in that the defendant falsely stated or caused to be stated in Block One of said application that the transfers of said machineguns and silencers were not subject to federally required transfer

taxes, and in Block Two (A) of said applications that the transferee of said machineguns and silencers was the Office of the District Attorney for Creek County, Oklahoma, knowing such entries to be false, in violation of Title 26, United States Code, Sections 5861(l), and 5871.

TONY M. GRAHAM
United States Attorney

/s/ NEAL KIRKPATRICK
Assistant United
States Attorney

A TRUE BILL

/s/ James S. Heisley
Foreman

NBK:rlk

APPENDIX D

DEPARTMENT OF THE TREASURY –
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
APPLICATION FOR TAX EXEMPT TRANSFER AND
REGISTRATION OF A FIREARM

DETACH THIS SHEET BEFORE COMPLETING
INSTRUCTIONS

1. DEFINITIONS.

a. FIREARM. The term "firearm" means: (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in b, below; (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Director, Bureau of Alcohol, Tobacco and Firearms, or authorized delegate, finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

b. ANY OTHER WEAPON. The term "any other weapon" means any weapon or device capable of being concealed on the person and from which a shot can be discharged through the energy of an explosive; a pistol or revolver having a barrel with a smooth bore designed or

redesigned to fire a fixed shotgun shell; weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading; and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

c. TRANSFEROR. The term "transferor" means the registered owner of a firearm who is applying to transfer it.

d. TRANSFEREE. The term "transferee" means the person desiring to acquire the firearm.

e. PERSON. The term "person" means any individual, company, corporation, association, firm, partnership, joint stock company, trust or society which is not a special (occupational) taxpayer.

2. PREPARATION OF APPLICATION FOR TAX-EXEMPT TRANSFER AND REGISTRATION OF FIREARM.

a. As set forth in section 5812, National Firearms Act (26 U.S.C., Chapter 53) and except as otherwise provided, persons seeking to transfer a firearm without payment of tax must complete in duplicate, a separate application on this form for each firearm. The applicant transferor must furnish all the information called for on this application form.

b. If the transferor of a destructive device, machinegun, short-barreled shotgun or short-barreled rifle is a licensee under 18 U.S.C., Chapter 44, and the transferee is anyone

other than a qualified licensee under the National Firearms Act (special (occupational) taxpayer), the transferee must complete item 2 (Applicant Certification) on the reverse side of ATF Form (5-7560.5).

Item 3 (Law Enforcement Certification) must be completed for the transfer of any NFA firearm to an individual other than a special (occupational) taxpayer.

c. If the transferee is an individual (including a licensed collector), in addition to satisfying the requirements of 2b. above, a recent 2" x 2" photograph must be affixed in item 1 on the reverse of ATF Form 5 and completed FBI Form FD-258, Fingerprint Card, in duplicate must be submitted. The fingerprints should be taken by a person qualified to do so, and must be clear, unsmudged and classifiable.

d. It is preferred that the form be prepared by the use of a typewriter, using carbon paper to make an exact duplicate. Pen and ink may be used, but under no circumstances will a form filled in by use of a lead pencil be accepted. All signatures on both copies MUST be original. Photocopies or other facsimiles are not acceptable. All changes made on the face of the form by the transferor must be initialed and dated.

e. If the transferee is acquiring the firearm as other than an individual, the trade name should be shown in item 2b. on the face of the ATF Form 5 and the business address should appear in items 2a. and 2c. A firearms licensee who is not a special (occupational) taxpayer may not acquire firearms as part of the business inventory and item 2b should be left blank. Items 2a. and 2c. should, in such case, reflect the home address.

f. If the firearm is being transferred from an estate, item 3a. should show the transferor as: Executor's name, title (Executor (or executrix, administrator, administratrix) of the Estate of (name)), and the executor's address. Item 3b. should reflect the last address of the decedent and date of death.

g. If any questions arise concerning the preparation of this form, please contact the NFA Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226 or the nearest Alcohol, Tobacco and Firearms office.

3. **DISPOSITION OF APPLICATION FOR TRANSFER AND REGISTRATION OF FIREARM.** The transferor will forward both copies of the form to the NFA Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226. If approved, the original of the approved form will be returned to the transferor for delivery to the transferee with the firearm, and this office will retain the duplicate. Approval of this form will effect registration of the firearm to the transferee. The transferor shall not under any circumstances deliver the firearm to the transferee until the approved form is received. This form must be retained by the transferee, and be available for inspection by Government officers until such time as the firearm may later be transferred after approval by this office. If the application is disapproved, the original will be returned to the transferor with the reason for disapproval.

4. **APPROVED TRANSFER NOT PHYSICALLY ACCOMPLISHED.** The transferor should mark the front of the form "VOID," sign and date the form and return the voided form to the Director. This will assure that the

firearm will remain registered in the name of the transferor who submitted the application.

5. **LATER TRANSFERS OF THE FIREARM.** If the firearm is to be transferred later by the new owner, a new application form covering the proposed transfer must be filed with the Director.

6. **TRANSFERS EXEMPT FROM TAX.** A registered firearm may be transferred without payment of tax under any of the following conditions:

a. If it is an unserviceable firearm being transferred as a curio or ornament. (NOTE: an unserviceable firearm is defined as one which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition. An acceptable method of rendering most firearms unserviceable is to fusion weld the chamber closed and fusion weld the barrel solidly to the frame. Certain unusual firearms require other methods to render the firearm unserviceable. Contact ATF for instructions when in doubt.)

b. To or from the United States, or any department, independent establishment or agency thereof.

c. To or from any State or possession of the United States or any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

d. To a lawful heir as defined in the laws of the State of residence of the decedent.

3. The National Firearms Act also provides that registered firearms may be transferred tax exempt between

firearms dealers who have also paid special (occupational) tax. In such instances, however, the application must be submitted on ATF Form 3.

7. **PERSONS PROHIBITED FROM RECEIVING FIREARMS.** Under 18 U.S.C., Chapter 44 and Title VII of Public Law 90-351, as amended, (18 U.S.C., Appendix), the following persons are prohibited from receiving a firearm, including an unserviceable firearm which has a frame or receiver: (1) fugitives from justice (any crime); (2) persons under indictment for, or who have been convicted of, a crime punishable for a term exceeding 1 year; (3) narcotic addicts or unlawful drug users; (4) persons adjudicated mental defectives or mentally incompetent, or who have been committed to any mental institution; (5) veterans discharged under dishonorable conditions; (6) persons who have renounced their United States citizenship; (7) aliens illegally or unlawfully in the United States; and (8) where the transferor is a firearms licensee, persons under 21 years of age in the case of any firearm other than a shotgun or a rifle and under 18 years of age in the case of a shotgun or a rifle. In addition, section 5812 of the National Firearms Act requires that an application to transfer a firearm be denied if the transfer, receipt or possession of the firearm would place the transferee in violation of law. The term "law" in this statute includes Federal laws as well as State statutes and local ordinances applicable to the locality where the transferee resides.

8. **PENALTIES.** Any person who violates or fails to comply with any of the requirements of the National Firearms Act shall, upon conviction, be fined not more than $10,000 or be imprisoned for not more than 10 years,

or both, in the discretion of the court. Moreover, any firearm involved in any violation of the provisions of the National Firearms Act or any regulations issued thereunder shall be subject to seizure and forfeiture. It is unlawful for any person to make or cause the making of a false entry on any application or record required by the National Firearms Act knowing such entry to be false.

NOTE: All provisions of Title I of the Gun Control Act must also be complied with, including the recordkeeping requirements for licensees.

SPECIAL NOTE: A direct interstate transfer will be approved only to a licensee who is also a special (occupational) taxpayer qualified to deal in the particular type NFA firearm, a government entity, a lawful heir, or, in the case of a firearm which has been designated as a "curio or relic," a licensed collector.

PAPERWORK REDUCTION ACT NOTICE

This form meets the clearance requirements of Section 3507, PL 96-511, 12/11/80. The information you provide is used to apply the tax-exempt transfer of an unserviceable firearm to anyone other than a Federal firearms licensee who has paid the required special (occupational) tax to deal in NFA firearms. The data is used to ensure legality of transfer under Federal, State and local law. The furnishing of this information is mandatory (26 USC 5812).

PRIVACY ACT INFORMATION

The following information is provided pursuant to Section 3 of the Privacy Act of 1974 (5 U.S.C. §552a(e)(3)):

1. **AUTHORITY.** Solicitation of this information is made pursuant to National Firearms Act (26 U.S.C. §5812). Disclosure of this information by the applicant is mandatory for any transfer without payment of transfer tax as provided in 26 U.S.C. §5852.

2. **PURPOSE.** To verify that the proposed transfer is exempt from transfer tax; to verify that the transfer would not be in violation of law; and to effect registration of the firearm.

3. **ROUTINE USES.** The information will be used by ATF to make the determinations set forth in paragraph 2. In addition, to effect registration of the firearm, information as to the identification of the firearm, date of registration, and the identification and address of person entitled to possess the firearm will be entered into the National Firearms Registration and Transfer Record. No information obtained from an application, registration, or records required to be submitted by a natural person in order to comply with any provision of the National Firearms Act or regulations issued thereunder, shall, except in connection with prosecution or other action for furnishing information, be used, directly or indirectly, as evidence against that person in any criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application. The information from this application may only be disclosed to Federal authorities for purpose of prosecution for violation of the National Firearms Act.

4. EFFECTS OF NOT SUPPLYING INFORMATION REQUESTED. Failure to supply complete information will delay processing and may cause denial of the application.

Form Approved: OMB No. 1512-0028 (10/31/89)

DEPARTMENT OF THE TREASURY — BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED.
TO BE SUBMITTED IN DUPLICATE
TO: National Firearms Act Branch
Bureau of Alcohol, Tobacco & Firearms
Washington, DC 20226

2a. TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal name below and check here: ☐)

2b. TRADE NAME *(See Instruction 2e)*

2c. COUNTY

3a. TRANSFEROR'S NAME AND MAILING ADDRESS *(If firearm is registered under your trade name, enter your trade name. EXECUTORS: See instruction 2f.)*

3b. IF APPLICABLE: DECEDENT'S NAME, ADDRESS AND DATE OF DEATH

1. TYPE OF TRANSFER: TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason *(See Instruction 6)*:

☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)
☐ FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)
☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)
☐ OTHER (Specify)

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3a.

49a

The above-named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

4. DESCRIPTION OF FIREARM *(Complete items a through i)*

a. NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM

b. TYPE OF FIREARM *(Short-barreled rifle, machine gun, destructive device, any other weapon, etc.)*

c. CALIBER, GAUGE OR SIZE *(Specify)*

d. MODEL

LENGTH *(Inches)* e. OF BARREL f. OVERALL

g. SERIAL NUMBER

h. ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIREARM *(Attach additional sheet if necessary)*

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION 6a? ☐ YES ☐ NO *(If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)*

5. TRANSFEREE'S FEDERAL FIREARMS LICENSE *(If any)*

(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

6. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.

b. CLASS

7. TRANSFEROR'S FEDERAL FIREARMS LICENSE *(If any)*

(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

8. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.

b. CLASS

UNDER PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct, and complete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the provisions of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended; or any provisions of State or local law.

9. SIGNATURE OF TRANSFEROR *(Or authorized official)*

10. NAME AND TITLE OF AUTHORIZED OFFICIAL *(Print or type)*

11. DATE

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

BY AUTHORITY OF THE DIRECTOR, THIS APPLICATION HAS BEEN EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE FIREARM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE:

☐ APPROVED *(With the following conditions, if any)*

☐ DISAPPROVED *(For the following reasons)*

EXAMINER	DATE	AUTHORIZED ATF OFFICIAL	DATE

CERTIFICATIONS

If the transferor of a destructive device, machinegun, short-barreled shotgun or short-barreled rifle is a Federal firearms licensee, and the transferee is anyone other than a licensee qualified to deal in the firearm to be transferred, the transferee must sign the Applicant Certification (item 2 below) in the presence of the law enforcement officer signing item 3 below. The Law Enforcement Certification (item 3 below) must be completed for the transfer of any registered firearm to an individual other than a licensee qualified to deal in the firearm to be transferred. In addition, the individual transferee must affix a recent photograph (taken within the past year) in item 1 and submit, in duplicate (to the transferor) two completed copies of FBI Form FD-258, Fingerprint Card. (See Important note below.)

1. PHOTOGRAPH

AFFIX
RECENT PHOTOGRAPH HERE
(Approximately 2" x 2")

2. APPLICANT CERTIFICATION

I, _____, have a reasonable necessity to possess the device or
(Name of Transferee)
weapon described on this application for the following reason(s)

_____

and my possession of the device or weapon would be consistent with public safety (18 U.S.C. 922(b) (4) and 27 CFR 178.98).

UNDER PENALTIES OF PERJURY, I declare that I have examined this application, and to the best of my knowledge and belief it is true, correct and complete; and that receipt and possession of the firearm described on this form will not place me in violation of the provisions of Chapter 44, Title 18, U.S.C.; Chapter 53, Title 26, U.S.C.; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended, or any provisions of State or local law.

_____ _____
(Signature of Transferee or official authorized to sign for firm) (Date)

3. LAW ENFORCEMENT CERTIFICATION (See IMPORTANT note below)

I certify that I am the chief law enforcement officer of the organization named below having jurisdiction in the area of residence of

_____. I have no information indicating that the transferee will use the firearm
(Name of Transferee)
or device described on this application for other than lawful purposes. I have no information that the receipt and/or possession of the firearm described in item 4 of this form would place the transferee in violation of State or local law.

_____
(Signature and Title of Chief Law Enforcement Officer - See IMPORTANT note below)

_____ _____
(Date)

_____
(Organization and Street Address)

IMPORTANT: The chief law enforcement officer is considered to be the Chief of Police for the transferee's city or town of residence; the Sheriff for the transferee's county of residence; a State or local district attorney or prosecutor having jurisdiction in the area of residence of the transferee; the Head of the State Police for the transferee's State of residence; or another person whose certification is acceptable to the Director, Bureau of Alcohol, Tobacco and Firearms. If someone has specific delegated authority to sign on behalf of the Chief of Police, Sheriff, etc., this fact must be noted by printing the Chief's, Sheriff's, or other authorized official's name and title, followed by the word "by" and the full signature and title of the delegated person.

U.S. GOVERNMENT PRINTING OFFICE: 1986 — 181-794

Form Approved: OMB No. 1512-0098 (06/30/88)

DEPARTMENT OF THE TREASURY — BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED.
TO BE SUBMITTED IN DUPLICATE
TO: National Firearms Act Branch
Bureau of Alcohol, Tobacco and Firearms
Washington, DC 20226

1. TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal address below and check here: ☐)

Seminole Police Dept.
211 North 4th
Seminole, OK 74868

2b. TRADE NAME (See Instruction 2e)

2c. COUNTY

3. TRANSFEROR'S NAME AND MAILING ADDRESS (If firearm is registered under your trade name, enter your trade name. EXECUTORS: See Instruction 2f.)

Colt Industries - Firearms Div.
150 Huyshope Ave.
Hartford, CT 06102

4. IF APPLICABLE: DECEDENT'S NAME, ADDRESS, AND DATE OF DEATH

5. TYPE OF TRANSFER: TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason See Instruction 6):

☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)

[X] FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)

☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)

☐ OTHER (Specify)

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3e.

The above named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

7. DESCRIPTION OF FIREARM (Complete items a through i)

a. NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM	b. TYPE OF FIREARM (Short-barreled rifle, machine gun, destructive device, any other weapon, etc.)	c. CALIBER, GAUGE OR SIZE (Specify)	d. MODEL	e. OR BARREL: (Inches)	f. OVERALL:	g. SERIAL NUMBER
Colt Industries-Firearms Div. 150 Huyshope Ave. Hartford, CT 06102	Grenade Launcher	40mm	M203	12"	19.1"	See Attached List

h. ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIREARM (Attach additional sheet if necessary)

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION 6a? ☐ YES ☐ NO (If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)

9. TRANSFEREE'S FEDERAL FIREARMS LICENSE (If any)

(Give complete 15 digit number)

First 6 digits	2 digits	2 digits	5 digits

10. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

11. TRANSFEROR'S FEDERAL FIREARMS LICENSE (If any)

(Give complete 15 digit number)

First 6 digits	2 digits	2 digits	5 digits
606002	10	0A	00363

12. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS
E.I.N. #13-1846375 1086	2

UNDER PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct and complete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the provisions of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended; or any provisions of State or local law.

13. SIGNATURE OF TRANSFEROR (Or authorized official)

Cheryl E. Maron

14. NAME AND TITLE OF AUTHORIZED OFFICIAL (Print or type) Cheryl E. Maron
Manager, Military Traffic

15. DATE
MAR 2 '90

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

BY AUTHORITY OF THE DIRECTOR, THIS APPLICATION HAS BEEN EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE FIREARM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE:

☒ APPROVED (With the following conditions, if any)

☐ DISAPPROVED (For the following reasons)

EXAMINER

DATE
09 MAR 1990

AUTHORIZED ATF OFFICIAL (Signature)

DATE
09 MAR

Form Approved: OMB No. 1512-0028 (10/31/88)

DEPARTMENT OF THE TREASURY – BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED.
TO BE SUBMITTED IN DUPLICATE
TO: National Firearms Act Branch
Bureau of Alcohol, Tobacco & Firearms
Washington, DC 20226

2a. TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal name below and check here: ☐)

Fleming, William H. & Kathy A.
FLEMING FIREARMS
7720 E. 126 St. N.
Collinsville, OK 74021

2b. TRADE NAME *(See Instruction 2a)*

2c. COUNTY

3a. TRANSFEROR'S NAME AND MAILING ADDRESS *(If firearm is registered under your trade name, enter your trade name. EXECUTORS: See instruction 2f.)*

Seminole Police Department
211 N. 4th
Seminole, OK 74868

3b. IF APPLICABLE: DECEDENT'S NAME, ADDRESS AND DATE OF DEATH

1. TYPE OF TRANSFER: TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason *(See Instruction 6)*:

☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)

☒ FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)

☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)

☐ OTHER (Specify)

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3a.

The above named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

4. DESCRIPTION OF FIREARM *(Complete items a through i)*

a. NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM	b. TYPE OF FIREARM *(Short barreled rifle, machine gun, destructive device, any other weapon, etc.*	c. CALIBER, GAUGE OR SIZE *(Specify)*	d. MODEL	e. LENGTH *(Inches)*
Colt, Ind.- Firearms Div. 150 Huyshope Ave. Hartford, CT 06102	Grenade Launcher	40mm	M-203	e. OF BARREL: 12" f. OVERALL: 15.1"

g. SERIAL NUMBER: 0175471

h. ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIREARM *(Attach additional sheet if necessary)*

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION 6a? ☐ YES ☒ NO *(If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)*

5. TRANSFEREE'S FEDERAL FIREARMS LICENSE *(If any)*
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits
573072	10	0F	51797

6. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS
73-1185157	2 MFG.

7. TRANSFEROR'S FEDERAL FIREARMS LICENSE *(If any)*
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

8. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

UNDER PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct, and complete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the provisions of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended; or any provisions of State or local law.

9. SIGNATURE OF TRANSFEROR *(Or authorized official)*	10. NAME AND TITLE OF AUTHORIZED OFFICIAL *(Print or type)*	11. DATE
Hunter Mixon	HUNTER MIXON CHIEF OF POLICE	4/17/90

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

BY AUTHORITY OF THE DIRECTOR, THIS APPLICATION HAS BEEN EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE FIREARM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE:

☐ APPROVED *(With the following conditions, if any)*

☐ DISAPPROVED *(For the following reasons)*

EXAMINER	DATE	AUTHORIZED ATF OFFICIAL	DATE
Col		Wayne P. Moore	24 APR 1990

ATF FORM 4 (5320.4) (10-83)

Form Approved: OMB No. 1512-0028 (9/30/86)

DEPARTMENT OF THE TREASURY -- BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED.
TO BE SUBMITTED IN DUPLICATE
TO: National Firearms Act Branch
Bureau of Alcohol, Tobacco & Firearms
Washington, DC 20226

2a. TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal name below and check here: ☐)

Seminole Police Department
211 N. 4th
Seminole, OK 74868

1. TYPE OF TRANSFER: TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason *(See Instruction 6)*:

☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)
☒ FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)
☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)
☐ OTHER (Specify)

2b. TRADE NAME *(See Instruction 2e)*

2c. COUNTY

3a. TRANSFEROR'S NAME AND MAILING ADDRESS *(If firearm is registered under your trade name, enter your trade name. EXECUTORS: See Instruction 2f.)*

George Edward Gibbons III
6717 Wood Duck
Corpus Christi, TX 78413

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3a.

3b. IF APPLICABLE: DECEDENT'S NAME, ADDRESS AND DATE OF DEATH

The above-named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

4. DESCRIPTION OF FIREARM *(Complete items a through l)*

a. NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM	b. TYPE OF FIREARM *(Short-barreled rifle, machine gun, destructive device, any other weapon, etc.)*	c. CALIBER, GAUGE OR SIZE *(Specify)*	d. MODEL	e. LENGTH OF BARREL *(Inches)*	f. OVERALL	g. SERIAL NUMBER
Pearl Mfg. Corp. Grants, NM 87020	Machine gun	308	AMT	20"	40"	20085

h. ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIREARM *(Attach additional sheet if necessary)*
SIG

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION 6a? ☐ YES ☒ NO *(If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)*

5. TRANSFEREE'S FEDERAL FIREARMS LICENSE *(If any)*
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

6. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

7. TRANSFEROR'S FEDERAL FIREARMS LICENSE *(If any)*
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

8. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

UNDER PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct, and complete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the provisions of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended; or any provisions of State or local law.

9. SIGNATURE OF TRANSFEROR *(Or authorized official)*	10. NAME AND TITLE OF AUTHORIZED OFFICIAL *(Print or type)*	11. DATE
George E Gibbons III	George E. Gibbons III	5-23-90

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

BY AUTHORITY OF THE DIRECTOR, THIS APPLICATION HAS BEEN EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE FIREARM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE:

☒ APPROVED *(With the following conditions, if any)*

☐ DISAPPROVED *(For the following reasons)*

EXAMINER	DATE	AUTHORIZED ATF OFFICIAL	DATE
		Wayne P. Moran	JUN 05 1990

ATF Form 5 (5320.5) (10-87)

G-163 FTR 6-19-

53a

342 1073

Form Approved: OMB No. 1512-0028 (10/31/89)

DEPARTMENT OF THE TREASURY – BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED.
TO BE SUBMITTED IN DUPLICATE
TO: National Firearms Act Branch
Bureau of Alcohol, Tobacco & Firearms
Washington, DC 20226

2a. TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal name below and check here: ☐)

Ratliff, Bobby H. Jr.
OLD DOMINION ARMORY
Rt. 2 Box 259
New Castle, VA 24127

2b. TRADE NAME *(See Instruction 2a)*

2c. COUNTY

3a. TRANSFEROR'S NAME AND MAILING ADDRESS *(If firearm is registered under your trade name, enter your trade name. EXECUTORS: See instruction 2f.)*

Seminole Police Department
211 N. 4th
Seminole, OK 74868

10022.

3b. IF APPLICABLE: DECEDENT'S NAME, ADDRESS AND DATE OF DEATH

1. TYPE OF TRANSFER: TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason *(See Instruction 6)*:

- ☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)
- ☒ FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)
- ☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)
- ☐ OTHER (Specify)

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3a.

54a

The above-named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

4. DESCRIPTION OF FIREARM *(Complete items a through i)*

a. NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM	b. TYPE OF FIREARM *(Short-barreled rifle, machine gun, destructive device, any other weapon, etc.)*	c. CALIBER, GAUGE OR SIZE *(Specify)*	d. MODEL
Pearl Mfg. Corp. Grants, NM 87020	Machine gun	308	AMT

LENGTH *(Inches)*	e. OF BARREL:	20"
	f. OVERALL:	40"

g. SERIAL NUMBER: 20085

h. ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIREARM *(Attach additional sheet if necessary)*

SIG

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION 6a? ☐ YES ☒ NO *(If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)*

5. TRANSFEREE'S FEDERAL FIREARMS LICENSE *(If any)*
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits
154024	01	3F	34067

6. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS
54-1532943	3

7. TRANSFEROR'S FEDERAL FIREARMS LICENSE *(If any)*
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

8. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

UNDER PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct, and complete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the provisions of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended; or any provisions of State or local law.

9. SIGNATURE OF TRANSFEROR *(Or authorized official)*	10. NAME AND TITLE OF AUTHORIZED OFFICIAL *(Print or type)*	11. DATE
Hunter Mixon	Hunter Mixon-Chief of Police	7/11/90

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

BY AUTHORITY OF THE DIRECTOR, THIS APPLICATION HAS BEEN EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE FIREARM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE:

☐ APPROVED *(With the following conditions, if any)*

☐ DISAPPROVED *(For the following reasons)*

EXAMINER	DATE	AUTHORIZED ATF OFFICIAL	DATE
		Wayne Miller	16 AUG 1990

...BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

...OR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED
TO BE SUBMITTED IN DUPLICATE
TO: National Firearms Act Branch
Bureau of Alcohol, Tobacco & Firearms
Washington, DC 20220

1a. TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal name below and check here: ☐

Office of District Attorney
Creek County Oklahoma
Creek County Courthouse
Sapulpa, OK 74066

1. TYPE OF TRANSFER: TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason (See Instruction 6):

- ☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)
- ☒ FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)
- ☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)
- ☐ OTHER (Specify)

2b. ...ADE NAME (See Instruction 2e)

2c. COUNTY

3a. TRANSFEROR'S NAME AND MAILING ADDRESS (If firearm is registered under your trade name, enter your trade name. EXECUTORS: See instruction 2f.)

Fleming, William H. & Kathy A.
FLEMING FIREARMS
7720 E. 126th St. N.
Collinsville, Ok 74021

10019

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3a.

55a

b. IF APPLICABLE: DECEDENT'S NAME, ADDRESS AND DATE OF DEATH

...he above-named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

DESCRIPTION OF FIREARM (Complete items a through i)

NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM	b. TYPE OF FIREARM (Short-barreled rifle, machine gun, destructive device, any other weapon, etc.)	c. CALIBER, GAUGE OR SIZE (Specify)	d. MODEL	e. OF BARREL: 5.7" f. OVERALL: 30.5"	g. SERIAL NUMBER
LEMING FIREARMS 720 E. 126th St. N. ollinsville, Ok 74021	Machine gun	9 mm	MP5SD	LENGTH (Inches)	7993

ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIR... M (Attach additional sheet if necessary) Model chang... l t...om MP5, BBL changed from 8.9" ...changed from 26.8"

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION – 6a? ☐ YES ☒ NO (If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)

...TRANSFEREE'S FEDERAL FIREARMS LICENSE (If any)
(Give complete 15-digit number)

...irst 6 digits	2 digits	2 digits	5 digits

7. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

...RANSFEROR'S FEDERAL FIREARMS LICENSE (If any)
(Give complete 15-digit number)

...rst 6 digits	2 digits	2 digits	5 digits
3072	10	OF	51797

8. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS
73-1185157	2 Mfg.

...R PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct, ...omplete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the ...ons of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe ... Act, as amended; or any provisions of State or local law.

...GNATURE OF TRANSFEROR (Or authorized official)

10. NAME AND TITLE OF AUTHORIZED OFFICIAL (Print or type)
William H. Fleming - Partner

11. DATE
2/9/90

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

...THORITY OF THE DIRECTOR, THIS APPLICATION HAS been EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE ...RM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE:

...IOVED (With the following conditions, if any)

☐ DISAPPROVED (For the following reasons)

...ER

DATE

AUTHORIZED ATF OFFICIAL
Wayne P. Moran

DATE
FEB 16 1990

...5 (5320.5) (10-83)

(1-16) ...: 6-20-...

FM 30924 Form Approved: OMB No. 1512-0026

DEPARTMENT OF THE TREASURY — BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

APPLICATION FOR TAX EXEMPT TRANSFER AND REGISTRATION OF A FIREARM

SEE INSTRUCTIONS ATTACHED
TO BE SUBMITTED IN DUPLICATE
TO National Firearms Act Branch
Bureau of Alcohol, Tobacco & Firearms
Washington, DC 20226

2a TRANSFEREE'S NAME AND ADDRESS (If transferee is a Special (Occupational) Taxpayer who is acquiring firearm for personal use, rather than as part of his business inventory, show personal name below and check here ☐)

STEPHEN W. SCRIBNER
300 N. CIMARRON
DRUMRIGHT, OKLA. 74030

2b. TRADE NAME (See Instruction 2e)

2c. COUNTY
CREEK

3a. TRANSFEROR'S NAME AND MAILING ADDRESS (If firearm is registered under your trade name, enter your trade name. EXECUTORS: See instruction 2f.)

Office of District Attorney
Creek County Oklahoma
Creek County Courthouse
Sapulpa, OK 74066

100.00

3b. IF APPLICABLE: DECEDENT'S NAME, ADDRESS AND DATE OF DEATH

1 TYPE OF TRANSFER TAX EXEMPT

I believe that I am entitled to exemption from the payment of the transfer tax imposed by Section 5811 (26 U.S.C. Chapter 53) on the firearm described herein for the following reason (See Instruction 6):

- ☐ FIREARM IS UNSERVICEABLE AND IS BEING TRANSFERRED AS A CURIO OR ORNAMENT (6a)
- ■ FIREARM IS BEING TRANSFERRED TO OR FROM A GOVERNMENT ENTITY (6b & 6c)
- ☐ FIREARM IS BEING TRANSFERRED TO A LAWFUL HEIR (6d)
- ☐ OTHER (Specify)

3c. NUMBER, STREET, CITY, STATE AND ZIP CODE OF RESIDENCE (OR FIREARMS BUSINESS PREMISES) IF DIFFERENT FROM ITEM 3a.

56a

The above-named and undersigned transferor hereby makes application as required by Section 5812 of the National Firearms Act to transfer and register the firearm described below to the transferee.

4 DESCRIPTION OF FIREARM (Complete items a through i)

a. NAME AND ADDRESS OF MANUFACTURER AND/OR IMPORTER OF FIREARM	b. TYPE OF FIREARM (Short-barreled rifle, machine gun, destructive device, any other weapon, etc.)	c. CALIBER, GAUGE OR SIZE (Specify)	d. MODEL	e. LENGTH OF BARREL (Inches)	f. OVERALL
FLEMING FIREARMS 7720 E. 126th St. N. Collinsville, OK 74021	Machine gun	9 mm	MP5SD	5.7"	30.5"

g. SERIAL NUMBER: 7993

h. ADDITIONAL DESCRIPTION OR DATA APPEARING ON FIREARM (Attach additional sheet if necessary) model changed from MP5, BBL changed from 8.9" and OA changed from 26.8"

i. IS THE FIREARM UNSERVICEABLE AS DEFINED IN INSTRUCTION 6a? ☐ YES ☒ NO (If "No," describe any other method by which firearm has been rendered unserviceable. Use additional sheets.)

5. TRANSFEREE'S FEDERAL FIREARMS LICENSE (If any)
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits
573019	01	3D	15902

6. TRANSFEREE'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

7. TRANSFEROR'S FEDERAL FIREARMS LICENSE (If any)
(Give complete 15-digit number)

First 6 digits	2 digits	2 digits	5 digits

8. TRANSFEROR'S SPECIAL (OCCUPATIONAL) TAX STATUS

a. ATF IDENTIFICATION NO.	b. CLASS

UNDER PENALTIES OF PERJURY, I DECLARE that I have examined this application, and to the best of my knowledge and belief it is true, correct, and complete, and that the transfer of the described firearm to the transferee and receipt and possession of it by the transferee are not prohibited by the provisions of Chapter 44, Title 18, United States Code; Chapter 53, Title 26, United States Code; or Title VII of the Omnibus Crime Control and Safe Streets Act, as amended; or any provisions of State or local law

9. SIGNATURE OF TRANSFEROR (Or authorized official)	10. NAME AND TITLE OF AUTHORIZED OFFICIAL (Print or type)	11. DATE
Don I. Nelson	DON I. NELSON/ASST. D.A.	5-4-90

THE SPACE BELOW IS FOR THE USE OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

BY AUTHORITY OF THE DIRECTOR, THIS APPLICATION HAS BEEN EXAMINED, AND THE TRANSFER AND REGISTRATION OF THE FIREARM DESCRIBED HEREIN AND THE INTERSTATE MOVEMENT OF THAT FIREARM, WHEN APPLICABLE, TO THE TRANSFEREE ARE

☐ APPROVED (With the following conditions, if any)

☐ DISAPPROVED (For the following reasons)

EXAMINER	DATE	AUTHORIZED ATF OFFICIAL	DATE

ATF FORM 5 (5320.5) (10-83)

APPENDIX F

26 U.S.C. § 5811

§ 5811. Transfer Tax

(a) **Rate.** – There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred, except, the transfer tax on any firearm classified as any other weapon under section 5845(e) shall be at the rate of $5 for each such firearm transferred.

(b) **By whom paid.** – The tax imposed by subsection (a) of this section shall be paid by the transferor.

(c) **Payment.** – The tax imposed by subsection (a) of this section shall be payable by the appropriate stamps prescribed for payment by the Secretary.

26 U.S.C. § 5812

§ 5812. Transfers

(a) **Application.** – A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary may

by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) **Transfer of possession.** – The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 U.S.C. § 5845(j)

§ 5845(j). Definitions

(j) **Transfer.** – The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

26 U.S.C. § 5852

§ 5852. General transfer and making tax exemption

(a) **Transfer.** – Any firearm may be transferred to the United States or any department, independent establishment, or agency thereof, without payment of the transfer tax imposed by section 5811.

(b) **Making by a person other than a qualified manufacturer.** – Any firearm may be made by, or on

behalf of, the United States, or any department, independent establishment, or agency thereof, without payment of the making tax imposed by section 5821.

(c) **Making by a qualified manufactuerer.** – A manufacturer qualified under this chapter to engage in such business may make the type of firearm which he is qualified to manufacture without payment of the making tax imposed by section 5821.

(d) **Transfers between special (occupational) taxpayers.** – A firearm registered to a person qualified under this chapter to engage in business as an importer, manufacturer, or dealer may be transferred by that person without payment of the transfer tax imposed by section 5811 to any other person qualified under this chapter to manufacture, import, or deal in that type of firearm.

(e) **Unserviceable firearm.** – An unserviceable firearm may be transferred as a curio or ornament without payment of the transfer tax imposed by section 5811, under such requirements as the Secretary may by regulations prescribe.

(f) **Right to exemption.** – No firearm may be transferred or made exempt from tax under the provisions of this section unless the transfer or making is performed pursuant to an application in such form and manner as the Secretary may by regulations prescribe.

26 U.S.C. § 5861(*l*)

§ 5861. Prohibited acts

It shall be unlawful for any person . . .

(*l*) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

27 C.F.R. § 179.81

§ 179.81 Scope of tax.

Except as otherwise provided in this part, each transfer of a firearm in the United States is subject to a tax . . .

27 C.F.R. § 179.82

§ 179.82 Rate of tax.

The transfer tax imposed with respect to firearms transferred within the United States is at the rate of $200 for each firearm transferred . . . . The tax imposed on the transfer of the firearm shall be paid by the transferor.

27 C.F.R.§ 179.90

§ 179.90 Certain government entities.

(a) A firearm may be transferred without payment of the transfer tax to or from any state, possession of the United States, any political subdivision thereof, or any official police organization of such a governmental entity engaged in criminal investigations.

(b) The exemption provided in paragraph (a) of this section shall be obtained by the transferor of the firearm filing with the Director an application, Form 5 (Firearms), Application for Tax-exempt Transfer and Registration of Firearm, in duplicate, executed under the penalties of

perjury. The application shall (1) show the name and address of the transferor and of the transferee, (2) identify the Federal firearms license and special (occupational) tax stamp, if any, of the transferor and of the transferee, (3) show the name and address of the manufacturer and the importer of the firearm, if known, (4) show the type, model, overall length (if applicable), length of barrel, caliber, gauge or size, serial number, and other marks of identification of the firearm, and (5) contain a statement by the transferor that the transferor is entitled to the exemption because either the transferor or the transferee is a governmental entity coming within the purview of paragraph (a) of this section. In the case of a transfer of a firearm by a governmental entity to a transferee who is a natural person not qualified as a manufacturer, importer, or dealer under this part, the transferee shall be further identified in the manner prescribed in § 179.85. If the Director approves an application, Form 5 (Firearms), the original Form 5 (Firearms) shall be returned to the transferor with the approval noted thereon. Approval of an application, Form 5 (Firearms), by the Director shall effectuate the registration of that firearm to the transferee. Upon receipt of the approved Form 5 (Firearms), the transferor shall deliver same with the firearm to the transferee. The transferor shall not transfer the firearm to the transferee until the application, Form 5 (Firearms), has been approved by the Director and the original thereof has been returned to the transferor. If the Director disapproves the application, Form 5 (Firearms), the original Form 5 (Firearms) shall be

returned to the transferor with the reasons for the disapproval stated thereon. An application by a governmental entity to transfer a firearm shall be denied if the transfer, receipt, or possession of a firearm would place the transferee in violation of law.

(c) The transferor shall be responsible for establishing the exempt status of the transferee before making a transfer under the provisions of this section. Therefore, before engaging in transfer negotiations with the transferee, the transferor should satisfy himself of the claimed exempt status of the transferee and the bona fides of the transaction. If not fully satisfied, the transferor should communicate with the Director, report all circumstances regarding the proposed transfer, and await the Director's advice before making application for transfer. An unapproved transfer or a transfer to an unauthorized person may subject the transferor to civil and criminal liabilities. (See 26 U.S.C. 5852, 5861, and 5871.)

(2)

Supreme Court, U.S.
FILED
AUG 23 1994

No. 93-2091

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM H. FLEMING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
JOHN F. DEPUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of conspiring to avoid payment of transfer taxes imposed by the National Firearms Act, and of knowingly making false statements on a government transfer application form.

2. Whether the jury was adequately instructed concerning petitioner's theory of defense.

3. Whether application of the rule of lenity requires reversal of petitioner's convictions.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	5
Cheek v. *United States*, 498 U.S. 192 (1991)	5, 9, 11
Frank Lyon Co. v. *United States*, 435 U.S. 561 (1978)	8
Gregory v. *Helvering*, 293 U.S. 465 (1935)	8
Moskal v. *United States*, 498 U.S. 103 (1990)	11
Smith v. *United States*, 113 S. Ct. 2050 (1993)	11
Staples v. *United States*, 114 S. Ct. 1793 (1994)	9
United States v. *Morris*, 20 F.3d 1111 (11th Cir. 1994)	10
United States v. *Pomponio*, 429 U.S. 10 (1976)	10-11
United States v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992)	11

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 552	5
National Firearms Act, 26 U.S.C. 5801 *et seq.*	2
26 U.S.C. 5811(a)	2
26 U.S.C. 5812(a)	2
26 U.S.C. 5845(a)	2
26 U.S.C. 5845(j)	6
26 U.S.C. 5853(a)	2
26 U.S.C. 5853(c)	3
26 U.S.C. 5861	9
26 U.S.C. 5861(*l*)	2, 9
18 U.S.C. 371	2
26 U.S.C. 7206(1)	10
27 C.F.R. 179.90(b)	3

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 19 F.3d 1325.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1994. The petition for a writ of certiorari was filed on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on two counts of conspiracy to violate the transfer tax provisions of the National Firearms Act, in violation of 18 U.S.C. 371, and one count of making a false statement in an application for a firearms transfer tax exemption, in violation of 26 U.S.C. 5861(*l*).[1] Petitioner was sentenced to three concurrent 46-month terms of imprisonment, to be followed by two years' supervised release. Pet. App. 1a-2a, 16a-21a. The court of appeals affirmed. Pet. App. 1a-15a.

1. The National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.*, defines the term "firearm" to include any machinegun or silencer. 26 U.S.C. 5845(a). Section 5811(a) of the NFA imposes a tax of $200 on the transfer of any covered firearm. In general, no covered firearm may be transferred unless the transferor has filed a transfer application with the Bureau of Alcohol, Tobacco and Firearms (BATF), the application has been approved, and the tax has been paid. See 26 U.S.C. 5812(a). The statute does, however, exempt from tax certain transfers, including transfers "to any State, * * * any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations." 26 U.S.C. 5853(a).

Anyone wishing to make a tax-exempt transfer of a firearm to a law enforcement entity must secure advance approval from BATF by submitting BATF Form 5,

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[1] The jury was unable to reach a verdict as to one additional conspiracy count and two additional false statement counts. Two counts alleging unlawful receipt and possession of firearms were dismissed on the government's motion. Pet. App. 16a-17a.

"Application for Tax Exempt Transfer and Registration of a Firearm." See 26 U.S.C. 5853(c); 27 C.F.R. 179.90(b) (*reprinted at* Pet. App. 60a-62a). In filling out that form, the transferor must check a box describing the applicable category of tax-exempt transfer and sign a statement under penalties of perjury declaring that he has examined the application and that its contents are "true, correct, and complete" to the best of his knowledge and belief. See Pet. App. 49a (reproducing form).

As summarized by the court of appeals (Pet. App. 3a-4a), the government's evidence at trial showed that petitioner, a federally licensed firearms dealer, brokered the sale of regulated firearms through the use of sham transfers designed to take advantage of the transfer tax exemption for law enforcement agencies. In one transaction, petitioner agreed to find a purchaser for six machineguns owned by a gun collector named George Gibbons. Petitioner later informed Gibbons that he had arranged for the Seminole, Oklahoma, Police Department to take the guns. Petitioner sent Gibbons a completed BATF Form 5 reflecting a tax-free transfer to the Department, which Gibbons signed and sent to BATF. After receiving approval from BATF, Gibbons shipped the guns to the Department, where they were received by then-Chief Hunter Mixon. Mixon in turn delivered the guns to Stephen Scribner, a reserve officer with a different police department and a former firearms dealer. Petitioner subsequently located a purchaser for the machineguns, whereupon the Seminole Department obtained approval for tax-free transfer of the weapons to that purchaser, Scribner delivered them to petitioner, and petitioner delivered them to the ultimate buyer. Scribner testified at trial that the six machineguns were transferred to the Seminole police so that petitioner

could save $1,200 in transfer tax. II Tr. 111-119; Pet. App. 7a.

In the second transaction (see Pet. App. 4a), petitioner engaged in a similar scheme involving the sale of two machineguns and two silencers to Scribner and Clayton Badger, a local attorney, through the Creek County, Oklahoma, District Attorney's office. Scribner and Badger testified that they agreed to buy the firearms from petitioner, and that the three of them discussed ways to "paper" the transaction. *Ibid.*; see II Tr. 137-138, III Tr. 400-414. After preparing the necessary forms and securing BATF approval to transfer the firearms tax-free from himself to the District Attorney's office, petitioner delivered the firearms directly to Scribner and Badger. He then prepared a second set of BATF forms requesting approval of a tax-free transfer from the District Attorney's office to Scribner and Badger. The District Attorney's office never actually received or delivered any of the firearms involved. Badger testified explicitly that the purpose of "papering" the transfer of the firearms through the District Attorney's office was to avoid payment of the transfer tax. Pet. App. 7a-8a; III Tr. 403.

2. A jury convicted petitioner of conspiracy to violate the firearms transfer tax provisions in connection with both of the transactions described above, and of making a false statement in an application for tax exemption in connection with the second transaction. Pet. App. 1a-2a. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals rejected (Pet. App. 5a-8a) petitioner's argument that the term "transfer" as defined in the NFA is broad enough to embrace sham "transfers" like those involved in this case, that his motive in arranging to make firearms transfers through law enforcement agencies was irrelevant, and that all the

statements he made on BATF application forms were literally true. The court held instead that the jury could look to the substance and not merely the form of petitioner's transfers, and that a reasonable jury could have concluded from the evidence that the transactions in question were shams that fell outside the intended scope of the statutory and regulatory tax exemption.

The court dismissed (Pet. App. 9a) petitioner's claim that the term "transfer" as used in the NFA is sufficiently vague to invoke the rule of lenity. Because "sham transactions set up solely to avoid the payment of the transfer tax" were "not transfers under any definition of the term," there was no ambiguity in the application of the statute to the facts of petitioner's case. *Ibid.*

Finally, the court rejected (Pet. App. 14a-15a) petitioner's argument that the district court erred in refusing his request for a jury instruction based on *Cheek* v. *United States*, 498 U.S. 192 (1991), which would have required the jury to find that he had "willfully" evaded the transfer tax and would have made his subjective good faith a defense. The court held that because petitioner's "crime was not merely evading the payment of taxes, but setting up sham transactions in order to mislead the BATF," there was no error in refusing to give the requested instruction on "willful" evasion.[2] Pet. App. 15a.

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[2] The court of appeals also rejected petitioner's claims that the government's transfer regulations were promulgated in violation of the Administrative Procedure Act, 5 U.S.C. 552 (Pet. App. 8a-9a); that the two conspiracy counts were multiplicitous (*id.* at 9a-10a); that the government failed to comply with the disclosure requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Pet. App. 11a-13a); and that the trial court improperly admitted certain rebuttal evidence (*id.* at 13a-14a).

ARGUMENT

1. Petitioner contends (Pet. 8-20) that he was improperly convicted because the NFA defines the term "transfer" so broadly that it includes "every physical transfer" (Pet. 18) of a regulated firearm.[3] Petitioner argues that a "transfer" occurs "any time the firearm changes actual, physical possession," Pet. 12, and that any physical transfer of a firearm to or from a law enforcement agency is tax exempt, even if made as part of a conspiracy to transfer the firearm from the original transferor to an ultimate, non-exempt transferee. Petitioner claims (Pet. 12-13) that in each of the transactions for which he was convicted, "the transferors made application and received approval from BATF to transfer the firearms to the transferees at which time physical possession of the firearms was delivered to the transferee," and therefore each of the transfers was legally exempt from tax, petitioner did not fail to pay any tax due, and petitioner made no false statement on any BATF form.

The court of appeals properly rejected petitioner's contentions. First, as the court observed (Pet. App. 4a, 8a), the evidence at trial disclosed that the machineguns and silencers involved in the transaction with Scribner and Badger were delivered to them directly by petitioner; "[n]o firearms were ever received or delivered by the Creek County District Attorney's Office." See also III Tr. 407-408. Thus, whatever the merits of petitioner's "physical transfer" theory, it does not support his position with respect to that transaction or with respect to the related false statement count—which is the only

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[3] 26 U.S.C. 5845(j) provides that "[t]he term 'transfer' and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of."

such count on which petitioner was convicted (see Pet. App. 4a). As to that transaction, petitioner prepared and submitted BATF forms requesting authorization for tax-exempt transfers to and from a law enforcement transferee, but then proceeded to transfer physical possession of the weapons directly to two different, non-exempt recipients. *Ibid.* Even under petitioner's own construction of the statute, the court of appeals' conclusion that he was properly convicted on the basis of those activities is inescapable.

With respect to the other transaction at issue here, petitioner did physically deliver six machineguns to the former Chief of the Seminole Police Department, with the evident understanding that the weapons would be held until petitioner had located a buyer, and then delivered to that buyer at petitioner's direction. Pet. App. 3a. In fact, as the trial evidence disclosed (*ibid.*), the weapons were actually held not by the Seminole police, but by Scribner; and they were finally delivered not by the police department to the ultimate buyer, but by Scribner back to petitioner and then to the buyer. *Id.* at 3a-4a. Petitioner documented that sequence of "physical transfers" as a single transfer from himself to the police department, and a second transfer from the department to the ultimate purchaser. Even without the direct testimony of Scribner as to petitioner's motivations (*id.* at 7a), the jury would have been amply justified in concluding that petitioner arranged the entire transaction as a ruse to avoid payment of the $1,200 in transfer tax due on his sale of the six machineguns to their ultimate non-exempt buyer.

Petitioner argues (Pet. 13-15) that because he in fact delivered several machineguns into the hands of a Seminole police officer, he was required to document and obtain permission for the transfer. That may well be

correct. It does not follow, however, that documenting that transfer satisfied all of petitioner's obligations. From the evidence presented at trial and described by the court of appeals, the jury was entitled to conclude that transfer of the guns to the police was merely an intermediate step in one integrated transaction, the intended and actual result of which was transfer of the firearms by petitioner to a non-exempt purchaser. See Pet. App. 7a. This Court and others have long held that where such intermediate steps have no independent economic, regulatory, or other significance or explanation, but are motivated solely by the desire to avoid taxes otherwise due on the underlying transaction, they may be disregarded for purposes of the tax laws. *E.g.*, *Gregory* v. *Helvering*, 293 U.S. 465, 469-470 (1935); compare *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 583-584 (1978).

The same principle governs in this case. As the court below recognized (Pet. App. 8a), the purpose of exempting law enforcement agencies from payment of the transfer tax on regulated firearms was to permit them to acquire or dispose of firearms for their own use without incurring a federal tax liability. In the case of petitioner's transactions involving the Seminole police, the evidence disclosed that the transfer of weapons bore no relation to police use or to any other governmental function; it was solely an artifice to enable petitioner to avoid payment of $1,200 in transfer taxes on his sale of the firearms to a private party. III Tr. 403; Pet. App. 7a. Likewise, in the case of the fictional transfer of machine-guns and silencers to the Creek County District Attorney's office, the evidence showed that the putative government transferee never received any firearms, but was used only to "paper" the transaction to avoid the transfer tax. Pet. App. 8a. The jury was entitled to

conclude that petitioner arranged the form of both transactions solely for purposes of concealing their substance and avoiding payment of the proper tax, and on that basis to convict petitioner of violating the tax statute.[4]

2. Petitioner argues (Pet. 20-25) that the decision below conflicts "in principle" with this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991). *Cheek* considered the meaning of the term "willfully" in two criminal tax provisions that explicitly contain that term, and held that in that context a defendant's good faith belief that he was not violating the law would preclude a finding of willfulness, regardless of whether the belief was objectively reasonable.[5] See *id.* at 193-194, 201-204.

As the court below explained (Pet. App. 14a-15a), petitioner was prosecuted not merely for non-payment of taxes, but for conspiring to evade payment by misleading

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[4] Petitioner's stated concern (Pet. 8, 15-20) that the holding in this case will make transferors of regulated firearms vulnerable to prosecution in any case where a governmental transferee might later dispose of the same firearms to a non-governmental party is remote from the facts of this case, in which the evidence demonstrated that petitioner always intended to arrange transfer of the weapons involved to non-exempt purchasers, and merely used cooperative government officials to sign sham forms or take temporary physical possession of firearms in order to conceal the substance of the underlying non-exempt transaction.

[5] The only explicit *mens rea* element in 26 U.S.C. 5861 is the requirement that a false entry on a required application, return, or record be made "knowingly." 26 U.S.C. 5861(*l*). The other provisions of the statute presumably require no more for conviction than that the defendant "know the facts that make his conduct illegal." *Staples* v. *United States*, 114 S. Ct. 1793, 1804 (1994). The indictment returned against petitioner charged, however, that petitioner and his co-conspirators acted "knowingly and willfully." Pet. App. 27a, 32a.

BATF through false statements and sham transactions. In that context, any "good faith" defense that may have been available to petitioner was adequately covered by the charge given to the jury. In particular, the district court instructed the jury that petitioner's defense to the conspiracy counts involved denying "that he acted willfully in failing to pay * * * transfer taxes." IX Tr. 1532. The court defined the term "willfully" to mean the doing of an act "voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." IX Tr. 1528.

In addition, in addressing the false statement counts, the court explained that one of the elements of the offense was "[t]o make or cause the making of a false entry on any application, return, or record required by this chapter, knowing such entry to be false," and that the offense involved "knowingly" making "any false or fictitious oral or written statement." IX Tr. 1529, 1531. The court further defined the term "knowingly" to mean an act "done voluntarily and intentionally" and not "because of mistake or accident or other innocent reason," and explained that "[t]he purpose of adding the word 'knowingly' is to ensure that no one will be convicted of any act done because of mistake or accident or other innocent reason." IX Tr. 1528. In light of those generous instructions, petitioner's claim of a conflict "in principle" with *Cheek* is without merit.[6] See also *United*

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[6] Petitioner cites (Pet. 21) *United States* v. *Morris*, 20 F.3d 1111 (11th Cir. 1994), which held that a defendant charged with filing false tax returns in violation of 26 U.S.C. 7206(1) was entitled to a special "good faith" instruction, in addition to adequate definitions of "knowingly" and "willfully," where the term "knowingly" was not part of the court's definition of the crime itself. 20 F.3d at 1117. The district court's instructions in this case included the

States v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam) (where jury is adequately instructed on willfulness, there is no requirement that a separate good faith instruction be given); *Cheek*, 498 U.S. at 201 (citing *Pomponio* with approval on that point).

3. Finally, relying on *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), petitioner claims (Pet. 25-30) that application of the rule of lenity requires reversal of his conviction because the NFA's use of the term "transfer" is ambiguous. As petitioner recognizes (Pet. 26), however, the rule of lenity applies only when a statutory term is ambiguous. See, *e.g.*, *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993); *Thompson/Center Arms Co.*, 112 S. Ct. at 2109; *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990). As the court of appeals stated (Pet. App. 9a) in rejecting petitioner's invocation of the rule in this case, the sham transactions engineered by petitioner were not "transfers" under any plausible reading of that term as used in the NFA. There was accordingly no ambiguity in the application of the statute to the facts of petitioner's case.

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terms "knowingly" and "willfully" in defining the crimes with which petitioner was charged. See IX Tr. 1525-1529.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOHN F. DEPUE
Attorney

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